ANGLO AMERICAN UNIVERSITY

No. 7, Spring 2016

AA Law Forum

Published by John H. Carey II School of Law

AA Law Forum is a joint effort of the faculty and graduates of the John H. Carey II School of Law to enhance studies of English law and comparative law at the Anglo-American University in Prague.

Mission Statement

Contents

ISSN 1804-1094

John H. Carey II School of Law
Anglo-American University
Letenská 5, Prague 1
Tel.: +420 257 530 202
E-mail: aalawforum@aauni.edu
URL: http://www.aauni.edu

AA Law Forum
Published by John H. Carey II School of Law
No. 7, Spring 2016

Editorial

Dear readers,

It is my pleasure to introduce another issue of the AA Law Forum. This edition is representative of the local legal community with the authors being esteemed instructors from various Prague-based institutions.

We open this issue with doc. JUDr. Pavel Svoboda, DEA, Ph.D., both a graduate of and Docent at Charles University in Prague, he is better known today for his position with as a member of the European Parliament and Chair of the Committee of Legal Affairs of the European Parliament. Doc. Svoboda has contributed his knowledge and expertise to AAU in the past as an external evaluator and provided insightful input that has helped lead us to our current state.

JUDr. Radka MacGregor Pelikanova, Ph.D., LL.M., MBA, in addition to external academic and advisory capacities, is a popular lecturer at Anglo-American University, specifically for Introduction to Law for business students) and Common Law Reasoning and Institutions, a core course for our future lawyers. JUDr. MacGregor Pelikanova will be inducting Intellectual Property into the local LLB curriculum in the 2016/17 academic year.

Pier Andrea Podda, Ph.D., a popular European Law lecturer throughout Prague and beyond, joined our returning lecturer, Dr. Massmiliano Pastore, MA, in the development not only of their article, Recast Brussels Regulation and the Challenges of Forum Shopping but also in the 2015/16 offering of Foundations of Law, an intensive induction in to the foundation and philosophical development of law for our Certificate of Higher Education students as well as those contemplating legal studies.

Finally, doc. Jiri Kasny, Th.D. responsible for the accumulation and assembly of these articles, closes this edition with an indication of the strength he brings to our Jurisprudence course. In the coming doc. Kašný will be expanding his offerings with “Philosophy and Society” in the program Humanities and Social Sciences.

Our scholastic events this past year were best represented by various mooting activities. From video appearances in the Channel Islands, and the subsequent distinctions, Best Overall Team, Best Oral Presentation, Best Individual Speaker, to advising the development and overseeing the implementation of the first University of London International Programme Global Network mooting event in Ghana, mooting has taken on an ever increasing role in our academic activities. This next year, along with the first physical issue, will see a mooting event return to AAU.

We hope that you gain insight from the following and are inspired to further engage with and support our activities. For more information about our future mooting events send an inquiry to mootcourt (at) aauni.edu. To submit an article for consideration write to aalawforum (at) aauni.edu.

With regards,

Jennifer Fallon, J.D.

Associate Dean
John H. Carey II School of Law
Anglo-American University
Prague

AA Law Forum
Published by John H. Carey II School of Law
No. 7, Spring 2016

EU Law Aspects of the Migration Crisi

Pavel Svoboda

Excellences, ladies and gentlemen, dear colleagues,[1]

Let me start by saying that it is a great honor for me to speak in the United Nations. The idea of cooperation and discussion as a necessary precondition for effective and peaceful solution of any problem which is behind the idea and reality of the United Nations is still valid and I believe it is still the basic principle of international relations which needs to be supported and implemented in all possible situations. It might not be easy, but unfortunately there are no easy solutions for difficult problems.

One of these really complex issues nowadays in the EU is the migration crisis. Let me now shortly describe the current situation. After this introduction I will focus on the so-called quota mechanism and I will continue by the Schengen and Dublin Regulations which I believe are integral part of the "problem".

Let me stress at the very outset, that I will be expressing my personal opinion and the one of the institution that I represent, namely the Legal Affairs Committee of the European Parliament.

Migration crisis in the EU

When it seemed that the European Union has overcome the crisis of the euro, it was hit by a perhaps even more serious crisis, the migration crisis. As we all know, migration is a wide-spread phenomenon of today´s globalized world. I dare to say, even here in the United Nations, that we need to at least rethink the framework and instruments which we are used to use in this area. It is definitely not about changing the values which are behind our humanitarian laws or changing the human rights standards, but we need to rethink the whole mechanism including legal aspects in order to be still able to apply these principle. By "we" I mean the European Union.

When talking about migration we are always considering many interconnected areas such as human rights, security, visa policy, social benefits, multiculturalism, social integration, unemployment, international relations etc. That´s why I think today´s migration crisis is even more serious that the financial "euro" crisis. Migration is difficult to handle even in "normal" circumstances \ whereas in a time of a mass crisis it seems almost impossible to handle. But as the president of Slovakia has put it: if the EU can´t cope with less refugees than Lebanon, then we have a serious problem.

Especially in the European Union when we need to face many challenges coming from the institutional arrangement of the Union such as the distribution of competences between the Union and the Member States. It is obvious that the current framework is not sufficient and it is said that we need crisis such as this one to finally realize what we could have seen some years ago. To illustrate

[1] The address was given in the United Nations, New York, November 9, 2015.

this let me quote from a speech of Cecilia Malmström, former Justice and Home Affairs Commissioner in Barroso´s Commission, who spoke at Harvard University in 2012 reflecting the EU response to Arab Spring. She said:

"Despite the clear humanitarian need, no European State took any serious initiative to provide shelter on its own soil to those in need of international protection. While the U.S. took several thousands, the European Union and Norway, took only 700."

And she continued: "Instead of solidarity among Member States, France and Italy quarrelled about possible risks for their internal security, with France even reinforcing controls at the internal border with Italy".

This is to illustrate that the current crisis is just a result of current insufficient European framework and this framework needs to be changed if we want to see better results. Unlike the financial euro crisis, in the area of migration, there is basically just a hint of an institutional structure that would be able to solve the problems. In the financial area, we have the European Central Bank, the Eurogroup and several Directorates of the European Commission. In the area of migration it is basically only the Council - i.e. the Member States - which has real possibilities to influence the situation. Frontex in Warsaw or the European Asylum Support Office (EASO) in Malta do not have such real capacity. The same is for the European Commission the competences of which are substantially limited by the Treaties. We may recall here that, pursuant to *Regulation 2007/2004*, which establishes the Frontex, the primary task of this agency is to coordinate Member States' cooperation in the protection of external borders, ensuring a consistent staff training or preparation of analyzes. In the current situation Frontex is really not an institution that is authorized to carry out protection of external borders and is not equipped to do it.

Therefore, it seems necessary to rethink the entire architecture of justice and home affairs area as it exists today in the form of the Lisbon Treaty. However, I believe that eventual withdrawal from the current model of cooperation and future preferences of bilateral and multilateral solution is not the way to guarantee success. On the contrary, I believe, that it is necessary to fulfill the ambitions of the Lisbon Treaty and realize what it can offer. In other words, unlike the institutional framework and unlike the euro crisis, there is an appropriate basic legal and we should move towards the realization of the objectives set in Articles 77 to 80 of the TFEU.

Therefore the EU should not recourse to international law instruments like in the euro crisis when it solved the problems by using bilateral or multilateral instruments. This is true in my view, even though – unlike the euro crisis- the current crisis threatens not only the EU but also other countries outside Europe. Our task is to focus on improving the functioning of the common EU area of freedom, security and justice. In relationship with third countries, then we can act together as a Union. In this context it is worth mentioning what the Commission said in the last Report on functioning of the Schengen area, that we should first effectively implement what we already have

and only afterwards, if we find out that this is not enough, it is possible to come up with new instruments.

Council decisions establishing the "quota mechanism"

Let me now focus on two recent Council Decisions establishing the so called quota system. These two Council decisions (2015/1523, 2015/1601) establish the so-called relocation mechanism in order to help Member States which are most affected by the rapid influx of asylum seeker.

There are some differences between the two of them: the first Decision concerned 40 000 people and was voted unanimously, the second one concerned 120 000 people and has been adopted by a qualified majority in the Council, the first one is based on voluntarily established numbers of refugees to be relocated; the second in its annex imposes exact numbers. However, both of them are based on the same legal basis and both could be shown as an example of how insufficient the current EU asylum policy is. Together they deal with 160 000 asylum seekers. It is obvious that – given the real numbers of migrants - this number is small, but let´s talk on the content later.

Regardless of these differences, the legal basis of the both Decisions is the Article 78(3) of the TFEU which reads as follows: "In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

This should be read in the context of Article 78(1) TFEU which states that the EU shall have: "a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

On the basis of these provisions, some Member States and academics have questioned the legality of these Council decisions. Let´s try to examine these Decisions from the legal perspective.

Article 79(5) TFEU states that the Member States have the right to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed. But this limitation applies only to this Article 79 on common migration policy and not to Article 78 on asylum policy. And it was paragraph 3 of this Article 78 that was used to introduce the quota mechanism.

It is therefore time to see, whether have all the elements set in the Article 78(3) been met and whether there exists a possibility to introduce a quota system in the European Union. I'll look first at procedural aspects and only then at the material ones.

From a procedural perspective, there has been a Commission proposal, there has been a vote in the Council and the European Parliament has been consulted. Both the two decisions seem also to be in compliance with Article 78(1), which requires that acts adopted according to this provision be in compliance with the principle of non-refoulement and the Geneva Convention. Another potential procedural doubt revolves around the principle of subsidiarity. As you know, as to division of powers, the EU functions according to the principle of delegated powers. This means that the EU has only those powers that the Member states have delegated to it. Some powers have been delegated completely and they've become exclusive to the EU, whereas some are shared among the EU and its member states. And it is in this area of shared competencies that the principle of subsidiarity applies. According to this principle the EU may intervene only if the matter cannot be more effectively dealt with by the Member States. This principle applies to all legislative acts, which according to Article 289 TFEU are characterized by some form of intervention of the European Parliament. Member States have the opportunity to draw attention to violations of the principle of subsidiarity as before the adoption of the draft, and then to make an action for annulment of the act. The European Commission, however, proposed the two decisions in question as a non-legislative acts, which is possible according to a formalist interpretation of Article 289 TFEU. As a consequence, this deprives the Member States of the possibility of challenging the subsidiarity principle before adopting the proposal, which could also serve as a reason for illegality of the decisions.

From a material point of view, there is a number of question marks.While examining another condition of Art. 78(1) TFEU, there is also no doubt that the Member States concerned will benefit from measures established by the Decisions. It is irrelevant whether other Member States would prefer a different solution. It has also been argued that "measures" according to Article 78(3) could be only financial support or technical support. I don´t think this is correct, since Article 80 TFEU states that "*the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.*" Therefore it is necessary to accept this broader interpretation of the Article 78(3) TFEU.

Some have also expressed doubts whether the two decisions are adopted in "emergency situation" as a reaction to a "sudden inflow" as required by art 78(3) TFEU. Firstly, I believe there is no doubt that there is an emergency situation now in Greece or in Italy. Secondly, the notion of "sudden inflow" needs to be understood in the context of ongoing migration crisis when in the last months there has been a clear increase in the number of asylum seekers. Some argued that it is not a sudden inflow as there had been a significant number of asylum seeker even before, but I am of the opinion that given the overall sharp increase in 2015, this not the argument for considering the Decision as illegal.

It could also be argued that we can talk about suddenness only in the case of the first decision on the first 40 000 asylum seekers, the next 120 000 can hardly be considered as sudden. But this division seems to me artificial and not linked to the reality of inflow.

The two decisions will apply for a period of 2 years which could be regarded as a provisional measure. We also need to take into consideration that within that time framework there might already be a permanent relocation mechanism in place which will replace the quota mechanism.

Referring to an intention of certain MSs to seek illegality of the two decisions before the Court of Justice of the European Union, I believe that the two Decision can´t be overruled should the claim would be based only on the above arguments. Article 80 TFEU states that "*the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle*."

Schengen Area and "Dublin" Regulation

In my opinion, certain international obligations made by the European Union and its Member States as well as the character of the European Union itself are now at stake. To illustrate this, let me continue by several comments on Schengen and Dublin Regulations. Before that, I wish to make several general remarks on the relationship between EU law and international law, namely the Geneva Treaty on refugees 1951 and its protocol 1967.

As regards compliance with international law, Article. 78 para. 1 TFEU expressly provides that "[t]his policy [ie. Policy asylum, subsidiary protection and temporary protection] shall be in accordance with the Geneva Convention on Refugees of 28 July 1951 and the Protocol relating to the Status of Refugees of 31 January 1967 and other relevant treaties."

To what extent can a refugee decide on the state where he/she asks for international protection? I had UNHCR people in my office the other day and they told me, that the refugee is not obliged to ask for asylum in the first save country, no matter how we define it. However, the Geneva Convention sets out a range of commitments of the Parties to refugees (see e.g. Art. 3, 7 (3 and 4), 8, 15, 17 (3), etc.). None of the provisions in question, however, gives the refugee the right to require that the proceedings be held in the territory of a particular party. That right does not result from the Protocol to the Geneva Convention. Therefore, the refugee should ask for asylum in the first save country. In my view, it is only in this context that one can fully accept the impunity of refugees for crossing borders in a way that is illegal for everybody else. However, the logical consequence of this would be, that a refugee becomes a mere economic migrant from the moment he/she crosses the border to another safe state. Now, look at the map and tell me, how a person originating from the conflict

countries can arrive in Germany without losing the status of refugee. In this context, we could have read in the news that Hungary is implementing a new law imposing criminal penalties upon those who cross Hungarian borders "illegally". But does Hungary have a border with any unsafe state? Again, let us look at the map: the answer is: NO.

Another issue is that of Member States' responsibility for making good the obligations of the Geneva Convention 1951. All EU Member States are parties to the Geneva Convention, but not the EU itself. However, the pre-emption or "occupied fields" doctrine in the area of so-called shared competences makes it clear that once the EU has legislated on a specific matter such a matter becomes its exclusive competence as long as the measure is in place. This is the case of the two decisions at stake. Yet this does not change anything vis-à-vis responsibility of the Member States for abiding with the Geneva Convention. In this context, one could point to Art. VI of the Protocol according to which in cases of federal states, the obligations of the federal government are identical to those of a unitary state. However, would there be political will to translate this provision in the way that the EU is a federation responsible for Member States' activities when it comes to occupied fields in the domain of asylum policy? I doubt it profoundly.

Another legal question follows: the EU is legislating on the refugees' relocation mechanism but is this mechanism in line with human rights' standards? Can you relocate a person against his/her will? The refugee has invoked his asylum right as a constitutional right in a particular MS, since there is nothing like an EU-wide asylum. Can such a MS carry out its constitutional rights outside its own territory? Within the German constitutional doctrine maybe yes, since the relocation does not deprive the asylum-seeker of the substance of the asylum right. But still, if so, aren't we returning to the question of EU-asylum system as a federal one, since Art. 80 TFEU speaking about *fair sharing responsibility*, may be construed as foreseeing a relocation mechanism? Let me leave this question open because honestly I don't have a satisfactory answer.

Nevertheless, in the context of human rights' considerations let me mention one judgement by the ECJ in case Cimade and Gisti (C-179/11) according to which there are minimum conditions for reception of asylum seekers even to an asylum seeker in respect of whom one Member States decides to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant. This judgement provides a minimum standard for every asylum seeker even when he/she applied to a Member State not responsible.

Another important point is the distinction between asylums a subsidiary protection. There is a lot of confusion here. This distinction is of special importance because according to the Geneva Convention, asylum is NOT available for persons who flee from war conflicts. For them, only temporary subsidiary protection is available. Refugee status and asylum is only those, who

show that: they are outside your own country; they have a well-founded fear of persecution; that persecution is because of your race, religion, nationality, membership of a particular social group or political opinion; and that they can't rely on their country's government to protect them from the persecution. A war is not among the reasons for granting asylum. The consequence is that war-fleers can get only a temporary protection without i.e. the right of family unification. But at least we know that in concrete cases this distinction can be established within the asylum procedure: ECJ C-604/12 H.N. v. Ireland.

Let me now continue with remarks on the Schengen area. Schengen area of free movement without internal border controls is generally considered as one of the biggest achievements of the European integration because it can provide a "real" result of the integration to the benefit of European citizens. This said we need to keep in mind that this cooperation started as an intergovernmental cooperation and only later became part of the European *acquis*. Article 77 (1a) TFEU says that: "*the Union shall develop a policy with a view to ensuring the absence of any controls on persons whatever their nationality, when crossing internal borders*". So there is a legal obligation and we can´t destroy this idea via police operation "on the territory" or by frequent reintroductions of controls at internal borders. Therefore the Schengen acquis is now an integral part of the current "problem" and we should do whatever we can to let the Schengen system continue and not to come back to a Europe divided by borders between Member States. That would be a real failure and it will be really hard, if not impossible, to create the Schengen area again.

Schengen is not just a *naive* project of the abolition of border controls, but it includes a number of so-called compensatory measures which are in place in order to compensate the missing internal border controls, measures such as police cooperation or information sharing via Schengen information system or Visa information system. So if someone today says that the reintroduction of controls at internal borders is a logical part of the solution to current crisis, the question is whether he/she realizes that even the reintroduction of controls has its own rules under the Regulation 562/2006 - Schengen Borders Code - and even that executing the police powers in the territory of Member states is regulated under Article 21 of this Regulation.[2] In

[2] The abolition of border control at internal borders shall not affect:
(a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:
  (i) do not have border control as an objective,
  (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime,
  (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders,
  (iv) are carried out on the basis of spot-checks;
(b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;
(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;
(d) the obligation on third-country nationals to report their presence on the territory of any Member State pursuant to the provisions of Article 22 of the Schengen Convention.

this context I should also mention two rulings of the Court of Justice of the EU, namely the cases of *Melki* (C-188/10)[3] and *Adil* (C-278/12)[4]. These judgments, I believe, do not go against the principle of necessity of ensuring citizens' safety. These judgements attempt to find a balance between freedom of movement and security. My own country, the Czech Republic, has put some effort into clarifying what police activity according to Article 21 of the Schengen Borders Code could still be regarded as legal and not having the effect equivalent to border checks. The Czech government discussed this with German government several times in the past and I am surprised now how quickly we left this stance and how easily we are now re-establishing border controls without even notifying this to the European Commission, because we say this is an exercise of police competences on the territory according to Article 21 of the Schengen Borders Code.

Schengen cooperation is a fragile achievement and there needs to be willingness to preserve it. If it is possible in the visa policy area, for example, that the Czech Consulate in St. Petersburg assesses and processes applications under the same rules as the Portuguese consulate in Beijing or the Danish consulate in Kenya, all in application of Regulation no. 810/2009 – the Visa Code - or if we can protect our external borders at international airports in the Czech Republic in accordance with the Schengen Borders Code, the question is whether we can apply a similar cooperation also in areas such as the asylum. Just as there is regulation 539/2001 establishing a common EU list of visa-free and visa countries, there may be a common EU list of safe countries for asylum purposes or a common code on asylum procedure.

The Dublin regulation on asylum was created as a logical step in the context of this Schengen area without internal border controls with Member States

[3] Article 67(2) TFEU, and Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen (Luxembourg) on 19 June 1990, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.

[4] Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which enables officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks, in a geographic area 20 kilometres from the land border between a Member State and the State parties to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990, with a view to establishing whether the persons stopped satisfy the requirements for lawful residence applicable in the Member State concerned, when those checks are based on general information and experience regarding the illegal residence of persons at the places where the checks are to be made, when they may also be carried out to a limited extent in order to obtain such general information and experience-based data in that regard, and when the carrying out of those checks is subject to certain limitations concerning, inter alia, their intensity and frequency.

responsible for external borders. However, it sets out only a weak framework that needs to be improved. Unification of asylum procedures and conditions for asylum seems to be one possible solution, since one of the reasons for the current crisis is, that we don´t have a strongly harmonized European asylum legislation, but only various national procedures on how to asses and process asylum applications. It is a long-term position not only of the Czech Republic, that in the field of asylum proceedings there should be uniform rules which, since that would also minimalize the so-called pull factors, such as the amount of benefits for asylum seekers etc. So it is now up to the Member States to try to elaborate on this idea of asylum procedure with a view to achieving something similar to the Visa Code. And let it be made clear that for the past 20 years since the Amsterdam Treaty it was states like Germany that insisted on asylum being in the exclusive state competence.

Here I would like to make a little remark on the quasi-suspension of the Dublin Regulation in Germany when they agreed to let in the asylum seekers from Hungary and Austria. In this context, we should remind ourselves that this could be regarded as a measure according to Article 17 of the Regulation 604/2013 – Dublin III Regulation – which stipulates that "*by way of derogation from Article 3(1)* – which deals with the criteria establishing responsible Member States – *each Member State may decide to examine an application for international protection lodged with it by a third country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation*." It could be said that this covers only those who have already applied for international protection, but I think it is good to mention this discretionary clause, because it shows that there is no real legal problem. The real problem is a lack of solidarity among Member States which led to today's situation when many people were left in a "no-man´s land" in Hungary or at the borders between Austria and Germany.

Conclusion

While trying to find a solution to the migrant crisis, we could be inspired by the development of the Schengen acquis, which was established as an intergovernmental treaty and gradually transformed into EU legislation and created a whole system of Schengen cooperation, establishing a uniform standard of protection of external borders, uniform standard visa process, the exchange of police information and freedom of movement without border controls. Return to the field of intergovernmental agreements is not an option.

I strongly believe that we need first to effectively implement all instruments we already have at our disposal before introducing new ones. But it seems to be clear by now that we need to create more harmonized European asylum legislation, eventually a regulation on common European asylum procedure. We have already achieved something in this respect. There is a Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the

content of the protection granted. But maybe in the case of this Directive we also need to talk about its minimum standards in order to find a new workable consensus. To take but one example, family unification became a big issue and Germany is now considering granting the Syrians only a subsidiarity protection which has no such consequence as family unification.

Let me conclude again by a quotation by Commissioner Malmström. In 2012 she said: Politicians in Europe need to show courage even if this could affect their ratings in the short run. It also means they have to stop accusing "the EU" of being the cause of all evil, that they stop blaming migrants that they stand up and refuse to let populist rhetoric dictate the agenda, that they clearly distance themselves from any xenophobic and discriminatory tendencies".

Author:

Doc. JUDr. Pavel Svoboda, Ph.D., D.E.A. is a member of the European Parliament and Chair of the Committee of Legal Affairs of the European Parliament.

AA Law Forum
Published by John H. Carey II School of Law
No. 7, Spring 2016

One decade with the TLD of the EU – domain names for all Europeans as a (un)wanted mission (im)possible for three European Commissions

Radka MacGregor Pelikánová and Robert Kenyon MacGregor

Introduction

European integration is a complex phenomenon entailing an abundance of complicated processes in various fields[1] within our post-modern, global and strongly virtualized society.[2] The intangible scenery all over the world, inside as well outside of the EU, is importantly marked and shaped by Information systems ("IS") which encompass a variety of disciplines analyzing and designing networks and databases aimed to facilitate the storage, communication and processing of data and other types of information.[3] These IS operate more and more based on the employment of Information technology ("IT"), which is the application of computers, telecommunications equipment and other modern devices assisting in the storage, retrieval, transfer and manipulation of data.[4] Undoubtedly, our post-modern society is marked by an intensification and extension of the use of IS/IT in almost all fields, leading to a general virtualization as well as by a vigorous global competition.[5]

A successful and sustainable enterprise in the EU, especially if it is a small and medium-sized enterprise ("SME"), needs to reflect these hallmarks and embrace appropriate new business methods, practices and forms[6] in order to be more effective and efficient than its rivals[7] without hurting consumers and the entire society.[8] Clearly, the EU appreciates that almost 99% of all business entities

[1] VEČEŘA, Miloš. The Process of Europenization of law in the context of Czech law. *Acta universitatis agriculturae et silviculturae Mendelianae Brunensis*, 2012, LX, 60 (2): 459-464. ISSN 1211-8516.

[2] MacGREGOR PELIKÁNOVÁ, Radka, MacGREGOR, Robert. General doctrines and principles of EU law and their impact on domain names. *AA Law Forum*, 2015, 6, 29-45. ISSN 1804-1094.

[3] MacGREGOR PELIKÁNOVÁ, Radka. Comparison of e-platform of National Rural Networks in selected EU member states, p. 246-252 IN: SMUTKA, Luboš (Ed.) *Proceedings of the Agrarian Perspectives XIII*, 16th September, 2014, Prague, Czech Republic : Česká zemědělská univerzita, 2014, 365 p. ISBN 978-80-213-2545-6. Available at http://ap.pef.czu.cz/static/proceedings/2014/

[4] MacGREGOR PELIKÁNOVÁ, Radka, MacGREGOR, Robert. General doctrines and principles of EU law and their impact on domain names. *AA Law Forum*, 2015, 6, 29-45. ISSN 1804-1094.

[5] MacGREGOR PELIKÁNOVÁ, Radka. Internet My Dearest, What Type of European Integration Is The Clearest? *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, LXI(7):2475-2481. ISSN 1211-8516. Permanently available at http://dx.doi.org/10.11118/actaun201361072475

[6] ŠIMBEROVÁ, Iveta. Company strategic marketing management – synergic approach and value creating. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2010, LVIII(6): 543–552. ISSN 1211-8516. Available at http://www.mendelu.cz/dok_server/slozka.pl?id=45392;download=72034

[7] SYCHROVÁ, Lucie. Measuring the effectiveness of marketing activities use in relation to company size. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, LXI(2):493-500. ISSN 1211-8516. Available at http://acta.mendelu.cz/61/2/0493/

[8] MacGREGOR PELIKÁNOVÁ, Radka. Divergence of antitrust enforcements – where, and where not, to collude. *Antitrust – Revue of Competition Law*, 2014, 2, i-viii. ISSN 1804-1183.

in the EU are SMEs and they account for over 70% of jobs and produce 60% of the total gross domestic product[9] and that they, as well as their bigger counterparts, need to master IS/IT. The flagship platform for IS/IT and the key virutalized platform is the Internet, the standardized and at the same time decentralized e-network of e-networks populated by Websites.

The role of the EU and EU member states is to understand this challenge, balance involved priorities and provide a framework encouraging the optimal employment of IS/IT by competitors on the internal market.[10] For over ten years, the macro-economically as well as micro-economically significance of the effective and efficient use of the Internet for e-business, especially its sub-form called e-commerce, [11] has been, doubtless, on the EU top level. For the last fifteen years, all three European Commissions, especially their Presidents, have pro-actively pushed for a TLD designed specifically for EU citizens and EU business, and for its heavy use. Well, TLD .eu has been employed for the last decade, but it is questionable how far or close to the set goals and objectives it is right now.

The setting of TLD .eu

The Internet is a global Meta-Net consisting of many e-devices and their nets allowing standardized communication. The Internet nets and sub-nets consist of two types of elements – the net communication capable e-devices, called nodes, and the data communication lines between these nodes, e.g. cables or fibers.[12] These nodes are server computers for hosting Websites, plain personal computers or other IT devices able to access the Internet and communicate, and even Internet sites such as Websites. Each of them has a unique numeric code address, IP numeric addresses, determined by protocols - Transmission Control Protocol ("TCP") an Internet Protocol ("IP"), i.e. TCP/IP.

The Internet is a universe spread in Top level domains ("TLDs"), each composed of sub-domains carrying domain names and which are linked to e-devices carrying code addresses, so called IP numeric addresses. The domain is a realm of administrative autonomy, authority and control within the Internet. The domain name is the name of a domain and they are delegated to their name servers having IP numeric addresses. Every Internet domain is a unique registered sphere typically delegated to two e-devices connected to the Internet, nameservers. Each nameserver has one IP numeric Address, but can be a platform for many domains from various TLDs[13] and naturally

[9] KRUML, Lukáš, DUSPIVA, Pavel. Effect of Controlling on the Economic Performance of SMEs in the Czech Republic. *Scientific Papers of the University of Pardubice*, Series D, 2015, 34(2): 63-74. ISSN 1211-555X.

[10] MacGREGOR PELIKÁNOVÁ, Radka. The unbearable lightness of imposing e-commerce in a vertical agreement setting. *Antitrust – Revue of Competition Law*, 2015, 3, 68-76. ISSN 1804-1183

[11] BÍLKOVÁ, Renáta, DVOŘÁK, Jiří. Possibilities in advancement of e-shop. *In Scienitific papers of the University of Pardubice. Series D, Faculty of Economics and Administration*, 2012, 25(3): 30-41. ISSN 1211-555X.

[12] CICHON, Caroline. *Internetverträge*. Köln, GE : Verlag Dr.Otto Schmidt, 2000, 370 S. ISBN 3-504-68024-5. JKU - E.I.3. Ci.1., S. 7.

[13] KÖHLER, Markus, ARNDT, Hans-Wolfgang. *Recht des Internet.* 7.Auflage. Heidelberg, GE : C.F.Müller, 2011, 336 S. ISBN 978-3-8114-9627-9. JKU - E.I.3 Ko.91,7, S. 6.

each domain has its domain name and can have its own Website attached or can forward to another domain with such a Website.[14] Thus each e-device attached to the Internet cannot have more than one IP-Address, but a duo of such e-devices can be a platform for many domains. The conversion between IP numeric addresses and domain names is performed by the Domain Name System ("DNS") built on 13 Root name servers, i.e. the DNS database is placed on special name computer servers and allows the conversion between verbal (domain name) and numeric (IP address) Internet identification.

TLDs are generic, gTLDs, national, ccTLDs, and new generic, new gTLDs, and because each TLD has its own legal and economic regime, individuals and entities should carefully study them in order to choose the best fitting TLD,[15] to have to choose between TLD .com, TLD .eu, etc. The Californian non profit corporation, the Internet Corporation for Assigned Names and Numbers ("ICANN") is responsible for domains coordination and DNS and delegates the administration of each TLD to one Registry Administrator. Thus, TLD .eu could be launched only after a technical "OK" from ICANN, i.e. technically entereing TLD .eu into the system in the correaltion with the 13 Rootnameservers, and after the legal "OK" from ICANN, i.e. the agreement between ICANN and the TLD .eu Registry Operator.

Thus the communication on the Internet is done based upon relevant protocols TCP/IP protocol and between e-devices identified by IP numeric addresses,[16] which are identified by convertible domain names. The presentation on the Internet is typically done while using Websites, which are set of related and connected Webpages located, or more precisely served, via a single web domain and hosted by one or more server computers accessible via the Internet. All publicly accessible Website collectives constitute the World Wide Web ("www"), while servers are all computers with appropriate storage capacity or similar devices on the www.[17] A host web server is astorage for a Website attached to a domain, a domain name is mainly a word indicator of an IP resource, a name and/or address of a personal computer and its sphere, a server computer or a Website.[18]

Almost two decades ago, there emerged the idea that the EU and EU subjects could benefit by having its own TLD. The idea was perceived positively and the only big dilemma was whether the TLD .eu should be just for the EU institutions or for "all" from the EU. The decision was reached that TLD .eu should be for "all" from the EU and the negotiations with ICANN administrating DNS as well as internal EU legislation could start already during the Jacques Santer Commission. However,

[14] KÖHLER, Markus, ARNDT, Hans-Wolfgang. *Recht des Internet.* 7.Auflage. Heidelberg, GE : C.F.Müller, 2011, 336 S. ISBN 978-3-8114-9627-9. JKU - E.I.3 Ko.91,7, S. 5.

[15] MacGREGOR PELIKÁNOVÁ, Radka. *Domain names – Their nature, functions, significance and value*. Saarbrücken, GE : Lambert Academic Press, 2014, 273 p. ISBN 978-3-659-62653-1.

[16] MacGREGOR PELIKÁNOVÁ, Radka. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly,* 2013, 4, 311-323. ISSN 1805-8396.

[17] KÖHLER, Markus, ARNDT, Hans-Wolfgang. *Recht des Internet.* 7.Auflage. Heidelberg, GE : C.F.Müller, 2011, 336 S. ISBN 978-3-8114-9627-9.

[18] MacGREGOR PELIKÁNOVÁ, Radka. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*, 2012, 3(1): 75-81, ISSN 2043-085X .

the rather dramatic events of alleged corruption and budget controversies did not make a sufficiently stable nourishing environement for a new project such as the introduction of TLD .eu. Still, the EU managed in 2000 to make ICANN grant the numeric code alfa-2 "eu". As a matter of fact, the initiative 'eEurope', approved by the Lisbon strategy[19] materialiazed even in the Council resolution 2000/C 293/02 on the organization and management of the Internet.[20] In 2001, the Romano Prodi Commission started its operation and already in 2002, the 1st Regulation about the projected TLD .eu was issued, namely the Regulation (EC) No. 733/2002 of the European Parliament and of the Council on the implementation of the .eu Top Level Domain ("Regulation 733/2002"). Thereafter, the Commission selected the European Registry for Internet Domain (EURid) and so was issued the Commission Regulation (EC) No 874/2004 for the laying down of public policy rules about the implementation and functions of the .eu Top Level Domain and the governing registration principles ("Regulation 874/2004") formulated general rules for the introduction and functions of TLD .eu and those principles to govern the registration.[21]

The internal legislative steps were followed by external legislative-technological confirmative action by the world Internet co-ordinator, ICANN. In 2005, José Manuel Barroso´s Commission rejoiced because ICANN defintily approved the TLD .eu and put in the Internet root zone, while having an agreement with Registry Administrator selected by the EU, EURid. Hence, the registration process of domain names from TLD .eu could start.

In 2010, the José Manuel Barroso Commission issued a very concrete and pragmatic document reflecting the (quasi-) post crisis(es) and containing 34 pages and providing clear messages and guidelines - Strategy Europe 2020 ("Strategy Europe 2020") in order to reach a smart (i), sustainable (ii) and inclusive growth (iii). This trio of priorities are projected into five targets where the EU wants to be in 2020 – 75% of the productive age population employed, 3% of the EU´s GDP invested in R&D, 20/20/20 climate energy targets, at least 40% of youth in college and 20 million less people at risk of poverty.[22] These 3 priorities and 5 targets are materialized by 7 flagship initiatives including a Digital Agenda for Europe, Innovation Union, and an Industrial policy for the globalization era to improve the business environment, especially for SMEs.[23] The Digital Agenda for Europe is classified, together with the Innovation Union and Youth on the Move, as a flagship initiative to reach the very first mentioned priority, smarth growth. The Digital Agenda for Europe is robust, includes 7 pillars with a total of 132

[19] The inciative eEurope approved by the European council in Lisabon on 23rd and 24 th 2000.

[20] „6. RESOLVES TO INSTRUCT THE COMMISSION:. …. to set up a European network bringing together the scientific, technical and legal skills that currently exist in the Member States with regard to domain name,address and Internet protocol management."

[21] MacGREGOR PELIKÁNOVÁ, Radka. Právní a ekonomický úspěch domény nejvyšší úrovně .eu – pravda či mýtus roku 2011? *Právo, ekonomika, management*, 2011, 2(4): 2-10. ISSN 1804-3550.

[22] EUROPEAN COMMISSION. *Europe 2020 – the EU´s ten year growth strategy*. Available at http://ec.europa.eu/europe2020/index_en.htm

[23] MacGREGOR PELIKÁNOVÁ, Radka. The unbearable lightness of imposing e-commerce in a vertical agreement setting. *Antitrust – Revue of Competition Law*, 2015, 3, 68-76. ISSN 1804-1183

suggested actions and its leitmotif is "to get the most out of digital technologies" for the EU´s citizens and businesses.[24] The Digital Agenda for Europe is inherently and intimately linked to the Digital Single Market Strategy, especially its pillar dealing with the access.[25] The current Commission of Jean-Claude Juncker further develops its trend and it is worthy to recall the statement of Jean-Claude Juncker in the European Parliament plenary session on 22nd October 2014 about the proposed first legislative initiatives of his Commission:"….*Every day, Europe is losing out by not unlocking the great potential of our huge digital single market. Jobs that should be there are not being created. Ideas – the DNA of Europe's economy! – do not materialise to the extent they should. Let us change this for the better.*"[26]

Considering the Strategy Europe 2020 and especially its Digital Single Market Strategy as well as the above self-explanatory proclamation, the European Commission of Jean-Claude Juncker definitely wants to modify rules to make cross-border e-commerce easier in the light of very interesting statistics from 2014 – 75% of Europeans have used the Internet on a regular basis but only 15% of Europeans have shopped online from another country and only 7% of SMEs have completed online sell cross-borders.[27] Beyond any doubt, the European Commission needs to update the e-commerce directive, clarify contractual rights, support enforcement and, last but not least, help individuals and businesses to be actively present within the domain hierarchical setting of the Internet, i.e. to "have their own" domain with a domain name. Naturally, the TLD for it, par excellance, should be the TLD .eu and thus European business as well as other subjects should eagerly register their domains under TLD .eu. The EU supports this idea and the Registry for TLD .eu, EURid is doing a great job promoting domain names from TLD .eu and offers them for small, and still decreasing, registration fees. Logically, Europeans should go for it. However, what is the reality and why it is so?

The wonderful culmination of the 1st decade of TLD .eu – perspective of the European Commission and EURid

The setting of a legal framework for TLD .eu was completed by the issuance of Regulation 874/2004 and by the conclusion of agreements by the selected Registry administrator, Belgian EURid, EU and of course ICANN. Still in 2004, EURid started to proactively look for an ADR provider operating in all official languages of the EU and with experience with arbitration and domain name disputer resolution.[28] As mentioned above, the final

[24] EUROPEAN COMMISSION. *A Europe 2020 Initiative - Digital Agenda for Europe.* Available at http://ec.europa.eu/digital-agenda/en/digital-europe

[25] EUROPEAN COMMISSION. *A Europe 2020 Initiative - Digital Agenda for Europe – Digital Single Market.* Available at http://ec.europa.eu/digital-agenda/digital-single-market

[26] EUROPEAN COMMISSION – JUNCKER, Jean-Claude. Setting Europe in Motion. President-elect Juncker´s Main Messages from his speech before the European Parliament. *Press Release Database*, 22.10.2014. Available at http://europa.eu/rapid/press-release_SPEECH-14-705_en.htm

[27] EUROPEAN COMMISSION. *A Europe 2020 Initiative - Digital Agenda for Europe – Digital Single Market - Access.* Available at http://ec.europa.eu/digital-agenda/access-digital-single-market

[28] RABAN, Přemysl, MORAVCOVÁ, Marie, STRNAD, Michal, TLOUŠŤOVÁ, Pavla, ZAHRADNÍKOVÁ, Radka.

approval of TLD .eu occurred in 2005, i.e. ICANN put TLD .eu in the Internet root zone[29] and EURid started the domain name registration process one decade ago.

The EU selected EURid to be the Registry Administrator for TLD .eu, which will enter in the standard Registry Agreement with ICANN, and the European Commission entered in 2004 with EURid into an appointment contract about it with a validity for five years. In 2009, this appointment contract between EU and EURid was about to expire and parties easily agreed about its extention for five years. In 2014, another five years extention was contracted by the European Commission and Eurid, and this based on decision 2014/207/EU.[30] Interestingly, the European Commission published a Call for expressions of intereset (2013/C 134/06 in 2013, but the only responding applicant was EURid and the evaluators concluded that EURid met the minimum requirments for each of the seleciton criteria. Thus, it was issued Commission implementing Decision 2014/207/EU[31] and according to its Art.2 the appointment contract is to be entered for five years and can be extended twice, each time for a maximum period of five years. So basically, the European Commission had, and used, not only the mandate to enter into an appointment contract with EURid in 2014 for five years, but in addition can do the same in 2019 and 2024. Well, we will see what will happen and if in 2024 still it will be in the EU, EURid, and TLD.eu's common interest to carry on.

Well, it appears that the European Commission does not have any serious objections to the operation of EURid and the manner how it manages and administers TLD.eu and does not seem to be inclined to recall the appointment of EURid to be the selected Registry Administrator, who should deal with ICANN. Similarly, ICANN does not seem to have any issues with EURid and its administration of TLD.eu. The ICANN and EURid agreement allowing EURid to be the Registry Administrator for TLD.eu, so called „.eu cc TLD Registry Agreement " has been in force and effect without any issues since 2005."[32] Thus neither the EU nor ICANN have objections to the manner how EURid administers TLD.eu and how EURid uses Registrars, which directly work with Registrants. EURid, as other TLD Registry Administrators, has the last word about the exact wording of the Registrar Agreement, while using the ICANN template, and about which Registrars will enter it. Of course, EURid has to pay, like other Registry Administrators, fees to ICANN, and these fees were USD 15 000 for the first two years of operations. Currently, these fees are getting

.eu domain name, .eu doména. 1.vydání. Praha, ČR : C.H.Beck, 2006, s.42-43. ISBN 80-7179-525-9.

[29] IANA (ICANN) Report on the delegation of the .eu Top Level Domain - March 2005. Available at https://www.iana.org/reports/2005/eu-report-05aug2005.pdf

[30] Commission Implementing Decision of 11 April 2014 on the designation of the .eu Top Level Registry (2014/207/EU) – available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.109.01.0041.01.ENG&toc=OJ:L:2014:109:FULL

[31] Commission implementing Decision of 11 April 2014 on the designation of the .eu Top Level Domain Registry (Text with EEA relevance) (2014/207/EU). Availabe at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0207&rid=3

[32] .eu cc TLD Registry Agreement between ICANN a EURid from 23rd June 2005. Available at https://www.icann.org/en/system/files/files/eu-icann-ra-23jun05-en.pdf

adjusted towards the standard ICANN Registry Agreement in the version from January 2014.[33]

The function of Registrars for TLD .eu has been basically identical to the function of Registrars for gTLDs or ccTLDs.[34] EURid requires that eligible candidates trying to become a Registrar for the TLD .eu complete an online application form, print it, sign it and send it.[35] However, the mutual signature of the standard template EURid Registrar Agreement ("ERA")[36] is not sufficient for the Registrar to go ahead and start registering, indeed a pre-payment of EUR 5 000 must be paid. The "Starter Programme" status allows a 50% reduction of this amount.[37] Thereafter,according to Art. 6 ERA and Exhibit 1 ERA, a Registrar shall pay a monthly fee to EURid of EUR 4, excl. VAT, per domain name for all domain names registered during the concerned month for the period of one year, and EUR 3.75, excl. VAT, per domain name for all domain names which were, during the relevant month, renewed for the period of one year.[38] The fee to be paid by the Registrar to EURid for each domain name transfer is EUR 4. Thus, each and every subject able to satisfy these financial requirements, agreeing to the ERA and the entire legal regime for domain names from TLD .eu and technically up-to-speed and level, can become the Registar for TLD .eu. Naturally, it can be as well the Registry for many other TLDs, irregardless whether ccTLDs, gTLDs or new gTLDs, such as, for example, Active 24 from the Czech Republic, which is a Registrar and thus offers domain names from TLD .cz, TLD .eu, TLD .com, etc. [39] It needs to be emphasized that the EU and EURid opted for a very relaxed regime regarding Registrar's selection, and neither an ICANN accreditation nor EU residency, citizenship or even a presence is required. Thus the list of Registrars for domain names within TLD .eu of the Registry Operator includes subjects from the EU as well as the USA and other non- EU countries.[40] Currently, there are over 750 Registrars for TLD .eu.[41] EURid works

[33] ICANN Standard (Model) Registry Agreement – version January, 2014. Available at https://www.icann.org/resources/pages/registries/registries-agreements-en - *Registry Operator shall pay ICANN a registry-level fee equal to (i) the registry fixed fee of US$6,250 per calendar quarter and (ii) the registry-level transaction fee (collectively, the "Registry-Level Fees"). The registry-level transaction fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25; provided, however that the registry-level transaction fee shall not apply until and unless more than 50,000 Transactions have occurred in the TLD during any calendar quarter or any consecutive four calendar quarter period in the aggregate (the "Transaction Threshold") and shall apply to each Transaction that occurred during each quarter in which the Transaction Threshold has been met, but shall not apply to each quarter in which the Transaction Threshold has not been met.*

[34] MacGREGOR PELIKÁNOVÁ, Radka. *Domain names – Their nature, functions, significance and value.* Saarbrücken, GE : Lambert Academic Press, 2014, 273 p. ISBN 978-3-659-62653-1.

[35] Official Website of EURid - http://www.eurid.eu/en/registrars/become-eu-registrar

[36] The EURid Registrar Agreement v.3 is available at URL. http://www.eurid.eu/files/docs/EG_RA_EN.pdf

[37] Official Website of EURid - https://www.eurid.eu/en/registrars/become-eu-registrar/prepayment-fees

[38] MacGREGOR PELIKÁNOVÁ, Radka. *Domain names – Their nature, functions, significance and value.* Saarbrücken, GE : Lambert Academic Press, 2014, 273 p. ISBN 978-3-659-62653-1.

[39] Active 24 - https://www.active24.cz/produkty-a-sluzby/domeny/

[40] Official Website of EURid - http://www.eurid.eu/en/get-eu/choose-registrar

[41] EURid. *Domain Names for Dummies*. Chichester, UK : John Wiley and Sons, Ltd, 2014. ISBN 978-1-118-88937-4 (pbk). ISBN 978-1-118-88956-5 (ebk). Available at http://viewer.zmags.com/publication/c5b181b8#/c5b181b8/68

with over 750 accredited Registrars and provides support in the 24 official EU languages. As part of its ongoing commitment to data security, EURid has been certified for the ISO27001 security standard since 2013. EURid is also registered by the EU Eco-Management and Audit Scheme (EMAS), which is an expression of its environmental commitment.[42]

Regulation 733/2002 explicitly states „The establishment of the .eu TLD should contribute to the promotion of the European Union image on the global information networks and bring an added value to the Internet naming system in addition to the national ccTLDs….Art. 4 Obligations of the Registry 1…2.… The Registry shall: (a) organise, administer and manage the .eu TLD in the general interest and on the basis of principles of quality, efficiency, reliability and accessibility; (b) register domain names in the .eu TLD through any accredited .eu Registrar requested by any: (i) undertaking having its registered office, central administrative or principal place of business within the Community, or(ii) organisation established within the Community without prejudice to the application of national law, or

(iii) natural person resident within the Community. Therefore, the Registry EURid registers domain names in the TLD .eu if the request is made by „someone“ or „something“ from the „Community“ through one of the over 750 accredited Registrars. Further Regulation 874/2004 explicitly confirms this eligibility criterion, i.e. it states in Art.2 „*An eligible party, as listed in Article 4(2)(b) of Regulation (EC) No 733/2002, may register one or more domain names under .eu TLD… Domain names registered under the .eu TLD shall only be transferable to parties that are eligible for registration of .eu domain names*.“ Ostensibly, TLD .eu should be the exclusive platform par excellence for the EU citizens, businesses [43] and entities peacefully co-existing in parallel with ccTLDs of EU member states.

EURid has been issuing quarterly reports informing about its activities and, of course, achievements. According to the Quarterly Report from the fall of 2015 (“EURid Report 3/2015”¨), the number of domain names newly registered in TLD .eu reached over 207 thousand in the 3rd quarter of the year 2015, the total number of domain names registered in TLD .eu increased in 19 EU member states and the renewal rate reached 77%.[44] Traditonally, the majority of Registrants came from Germany, the Netherlands, France, Poland, the United Kingdom, Italy and the Czech Republic. Interestingly, the majority of registrations were done through Registrars that came as well from Germany, the Netherlands, France and Poland, followed by the United States and Italy. Regading the dispute resolution, the number of domain

[42] EURid 2015 World Report on Internationalised Domain Names – Available at http://www.eurid.eu/en/news/dec-2015/eurid-publishes-its-2015-world-report-internationalised-domain-names-0

[43] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN

[44] EURid Quarterly Progress Report 2015 Q3 - http://www.eurid.eu/files/docs/Quarterly%20Report_Q3_2015.pdf

names suits filed by the Prague Arbitration Court per a quarter of the year has oscillated around 15 and the reduction in the amount of 50% of the cost of basic proceeding offered by the Prague Arbitration Court in 2012 continues, i.e. the fees of dispute resolution per one disputed domain name reaches EUR 900 for the panelist and EUR 400 for the Court, i.e. in total the dispute resolution should cost EUR 1 300. However, in addition, the Prague Arbitraiton Court made a temporary discount on ADR fees of EUR 1000 per filing an ADR complaint and e.g. the fee for disputing one domain name before the single-member panel will be EUR 300 instead of EUR 1 300, the fee for disputing six domain names before the three-member panel will be EUR 3 000 EUR instead of EUR 4 000 etc.[45] Thus, it appears that TLD .eu is well conceived, popular and enjoying a great substantial as well procedural system with a smooth and cheap dispute resolution. Well, at least according to the EURid Report 3/2015.

Pursuant to Regulation 733/2002, the European Commission must issue every second year a report about TLD .eu for the European Parliament and the Council. Thus, the Report from the European Commission to the European Parliament and the Council on the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013 („EC Report 2013")[46] covers the period from 2011 to 2013 and shares the same tenor as EURid Report 3/2015 and thus sounds prima facia as well very positive. Pursuant to the EC Report 2013, TLD.com kept growing and became the 11th most popular TLD and 4th most popular ccTLD in Europe, naturely after TLD .de, TLD. uk and TLD.nl. [47] The EK Report 2013 continued by emphasizing that *„despite the economic and financial crisis, the .eu TLD has consolidated its growth and even experienced better performances in some countries. The renewal rate of .eu domain names remains at an average of 80%, against an industry average of 73%. Industry rivalry has been intensifying in the past 5 years, following the liberalisation of certain ccTLDs and the introduction or rebranding of existing TLDs, e.g. .co, .me. In addition, the arrival of more than 1,000 new gTLDs will be a huge market shock, likely to prove disruptive to existing business models and that will further intensify industry rivalry. Given the historical trend and the current market situation, EURid's goal is to maintain a steady growth rate in*

[45] Official Website of the Prague Arbitration Court – Arbitration Center for .eu Disputes. Available at http://eu.adr.eu/index.php?lang=en

[46] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN

[47] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN –„…*In the reporting period, the .eu TLD continued to grow steadily in line with the other European country code TLDs. The .eu TLD has reached a total of 3.7 million registrations, making the domain the eleventh largest TLD in the world and Europe's fourth most popular ccTLD. This represents an increase of 0.3 million registrations since the last report submitted to the European Parliament and the Council. In Europe, only .de (Germany), .uk (UK) and .nl (the Netherlands) remain in a stronger position in terms of registration numbers"*

registrations of around 5-8 % per year." [48] Further, the EC Report 2013 dealt with the issue of international domain names („IDN") at the top level, i.e. the „no latin" abbreviation indicating the TLD, which is the part of the domain name after the last dot and fully recognized the compentence of ICANN. Even more interestingly, the EC Report 2013 included the information about the wholesale price and cost decrease for domain names from TLD .eu, namely that EURid charges only EUR 3,75 for the registration or renewal of a domain name, keps annual revenues and costs around EUR 13 million and net financial result between EUR 0,5 and 1 million.[49] It is worthy to point out that almost EUR 3 million is spent by the Registy on marketing and EUR 150 thousand on promoting and giving stimulus to the ADR.[50] EC Report 2013 summarized that ADR provided by the Prague Arbitration Court deals annually with approximately 50 cases, 73% of the complaints are accepted and the fees are set based on the cost recovery principle. There are virtually no European or national law cases against EURid due to domain names from TLD .com, there were just a few national cases and one European, i.e. C-376/11 Pie Optiek vs. Bureau Gevers regarding "lenswordl.eu". The Court of Justice of the EU ruled in C-376/11 that **"***The third subparagraph of Article 12(2) of Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration must be interpreted as meaning that, in a situation where the prior right concerned is a trade mark right, the words*

[48] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN

[49] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN - „*The introduction of IDNs at the top level, i.e. on the right-hand side of the last dot of a domain name, is a matter that falls within the competence of ICANN. As a result of the increasing domain name portfolio, the revenues originating from domain name renewals have been increasing. In order to remain in line with its contractual obligation to work at cost, the Registry decided to change the renewal and term extension fee of a domain name from EUR 4,00 to EUR 3,75 as of 1 January 2013. The key financial aspects of the Registry remained stable in 2011 and 2012. Both the revenues and costs of the Registry have been around €13 million for both years. Consequently, the net financial result has been more balanced than in previous years with a surplus to the benefit of the EU budget of €772,892 for accounting year 2011 and €443,117 for 2012."*

[50] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN – „*..Changes in the budgeted and actual costs of the Registry were closely scrutinised by the Commission, in particular costs relating to marketing (€2.8 million in 2011 and €2.7 million in 2012) and human resources (€4.0 million in 2011 and €4.4 million in 2012). The increase in costs was justified by the need for enhanced quality of service and increased security levels. The Registry maintains four types of financial reserves: depreciation, investments, social liabilities and legal liabilities. Over the reporting period, the total level of reserves remained stable: €5.4 million in 2011 and €5.0 million in 2012. At the end of 2012, this total was divided between the reserve for depreciation (€1.0 million), the reserve for investments (€0.5 million), the reserve for social liabilities (€2.7 million) and the reserve for legal liabilities (€0.8 million). Furthermore, a provision of €150,000 was added to promote and incentivize the Alternative Dispute Resolution…"*

'licensees of prior rights' do not refer to a person who has been authorised by the proprietor of the trade mark concerned solely to register, in his own name but on behalf of that proprietor, a domain name identical or similar to that trade mark, but without that person being authorised to use the trade mark commercially in a manner consistent with its functions."[51]

The EC Report 2013 concludes the „The .eu TLD model has been successfully implemented and is operating effectively. Over the past two years, the .eu TLD has strengthened its position as one of the biggest and most popular Top-Level Domains in Europe and the world. …. ICANN has not yet completed the changes in the ccTLD IDN strings evaluation procedure allowing for the re-assessment of the rejected string (.ευ in Greek because of allegedly confusingly similarity with other strings). The Commission has urged ICANN to complete this process as soon as possible. It has made it clear that the future rules establishing a 'permanent' IDN application procedure should be designed in such a way as to avoid any undue delays. This is one of the public policy issues that the Commission will continue to raise in the Governmental Advisory Committee which provides advice to ICANN. The financial situation of the Registry remained stable in 2011 and 2012. The ADR system provided by the Czech Arbitration Court allows for the protection of the rights of registrants in all the EU languages. …. In the years to come, the Registry should work on strengthening and developing the perception of the .eu TLD amongst different target groups in order to expand its penetration of the European domain name market and to reinforce public awareness of the TLD." Since then, two years have passed, so do we see an expansition and/or penetration of the TLD .eu?

The meagre culmination of the 1st decade of TLD .eu – hidden perspective

In order to more objectively assess whether TLD .eu and domain names from TLD .eu are the desireable heaven safe harbor for EU citizens and businesses, it is instrumental to follow the Meta-Analysis and holistic approach. As a matter of fact, a deeper study of both above mentioned reports, EURid Report 3/2015 and EC Report 2013, needs to be conducted while bringing case notes and direct field observation critical comments. Naturally, this should be completed by a more extensive primary data. Nevertheless, due to the extent of this presentation, following development covers only both reports.

EURid Report 3/2015 starts with a quote of Marc Van Wesemael, General Manager at EURid: "*The total number of .eu registrations increased in 19 countries during Q3 2015*", but already focusing in charts and small print includes the second part of the message, which is much less laudatory. Indeed, the total number of domain names registered in TLD .eu is unable to reach the magic number 4 million and, basically, the last two years demonstrate just quantitative stagnation for TLD .eu. The EURid Report 3/2015 admits to a

[51] C-376/11 Pie Optiek vs. Bureau Gevers regarding "lenswordl.eu". Available at

decrease of 0,5% in the number of .eu domain names, while the number of domain names from e.g. TLD .com and even ccTLDs of EU member states keeps, despite the new gTLDs, increasing.[52] The biggest bulk of domain names from TLD .eu belong to Registrants from Germany, the Netherlands, Poland and the United Kingdom and these five countries contribute more than significantly to European integration success, and this not only on the economic level. Great, but a closer look in the charts reveals that the largest decrease of interest in TLD .eu is in Denmark (by 10%), Finland (by 9%), France (by 6%), Germany (by 6%), Benelux countries, Austria (by 3%) and Spain (by 1%). In other words, citizens and businesses from these countries are moving away from TLD .eu and the total number of their registrations has been decreasing. This loss is offset by an increase of registrations for Registrants from Iceland and Norway, which are not EU, but EFTA states and can participate in TLD .eu, only because they are members of the EEA. Further, the number of registrations increases for Registrants from Cyprus, Malta, etc. Well, this trend is at least questionable, if not directly worrysome. Could it be that the smaller EU countries, plus those not part of the EU, but wishing, in their 'small country' way to be identified with the big, strong EU, hoping to gain in prestige via a .eu cognomen? Will this be the future of .eu, that the small countries will hold firm to the .eu brand, while the bigger countries turn back to .com, or one of the new GTLDs? Certainly a problem to be considered with the wealth of of new GTLDs and .eu is the "Balkanization" of domain names. As author Teresa Tomeo, in her book on communications entitled "Noise" writes,[53] there is so much noise, so much useless junk bombarding us, be it background or in front of us, in our lives, that it is difficult for people today to sort through the gobbledygook, the unimportant stuff, so as to focus on what really matters. This obviously includes sorting through today's extremely liberally biased newspapers to find the truth. The same thing applies to .eu, among others. With so many options clouding the horizons, will consumers/businesses take the time to sort through the many various Top level domains, or simply go to .com, figuring that if what they want is not there, why bother looking further? "Buy the best, and to H--- with the rest" is an old American saying. The gold standard is .com, and that doesn't figure to change any time soon. Thus, could it be that Germany, Great Britain and other forward-looking nations may place increasing reliance on their .com name and treat .eu as a mere appendage perhaps usefull for small, local trade? This is certainly a point to consider, and the increasingly bad reputation the EU is taking on is another factor. The EU's ham-handed lashing out against the distribution of powers and

[52] EURid Quarterly Progress Report 2015 Q3 - http://www.eurid.eu/files/docs/Quarterly%20Report_Q3_2015.pdf – „*The total number of .eu domain name registered at the end of Q3 represented a decrease of 0.5%, or 21 292 registrations, when compared with the total number at the end of Q3 2014. The national ccTLD market in EU countries(1) increased by 0.6% during Q3 2015, and grew by 2.6% from Q3 2014. Within the EU, the market for gTLD domain names such as .com, .net, .org, .info and .biz grew by 1.0% during Q3 2015 and by 5.5% from Q3 2014, according to statistics from Zooknic.*"

[53] TOMEO, Teresa. Noise: How Our Media-saturated Culture Dominates Lives and Dismantles Families. Revised Edition. Pennsylvania, US : Published by Ascension Press, 2012, 180 p. ISBN 10-1932927948 / ISBN 13 - 9781932927948.

competencies as set by the TEU and TFEU, which leads to force EU member states to house those who are in breach of EU law as well national law, whose history of the last 1300 years has been antithetical to that of Europe, based on Christianity, and who are not welcome by the majority of the EU citizens. This definitely undermines the post-Lisbon EU self-proclamation to be "closer to Europeans" and degrades the trust of EU citizens in their elected as well as unelected representatives and governors. By March, 2016, Angela Merkel's popularity and standing has plummeted and she has reversed her invitations to immigrants, but has found, to her dismay, that putting the cork back into the bottle, sending them back, is far more difficult than inviting them in. Additionally, Germany has lost track of over 130,000 of 'Merkel's guests',[54] this doesn't sound like people that are willing 'buy into' the laws of Western Civilization. Actually, these leaders seem to be rather a secluded group of often "recycled political meritocrats" and bureaucrats, who have a similar background, education, and high paychecks and who are allegedly bored, self-centered and naïve,[55] in sum they are detached from average Europeans.

Pursuant to the EC Report 2013, TLD .eu kept growing and became the 11th most popular TLDs and 4th most popular ccTLD in Europe, naturely after TLD .de, TLD. uk and TLD .nl. [56] Well, the EC Report 2013 is from 2013 and thus this was the so far last opportunity to speak about a quantitative growth of TLD .eu. Further, the EC Report

[54] HUGGLER, Justin Germany admits 130,000 assylum seekers "lost" raising fears over crime and terrorism. *The Telegraph,* 26th February, 2016. Available at .http://www.telegraph.co.uk/news/worldnews/europe/germany/12174803/Germany-admits-130000-asylum-seekers-lost-raising-fears-over-crime-and-terrorism.html

[55] e.g. CHARLEMANGE. The bureaucrats of Brussesl – Are Eurocrats in it for the money, *The Economist*, 22nd June, 2010. Available at - http://www.economist.com/blogs/charlemagne/2010/06/bureaucrats_brussels - "*...Yes, the Brussels bubble has its share of venal and lazy officials paid more than they deserve. Yes, you do hear stories about keen young things being taken on one side and told to start taking long lunches or trim their hours, in order to avoid showing up their elders. The staff trade unions at the EU institutions are certainly a ghastly bunch, forever whining and moaning about their conditions without showing the slightest awareness that they have some of the safest jobs in the world, at a time of global recession. I have also always thought it was a subtly corrupting decision to exempt Brussels-based officials from the (cripplingly high) income taxes levied in Belgium and charge them special (low) EU taxes. …. I think other things mark out EU officials, as a breed. Here, briefly, are some distinctive characteristics I think I have spotted. EU officials live in a world in which nationalism is the great evil… They are often highly educated, in a geeky sort of way: the EU exams are hard to pass, and the finer points of EU treaties (like the finer points of theology) do not appeal to everyone. I have written before that many of them live in a bit of a gilded cage, bored in corners of the institutions where nothing much is happening, and glumly resigned to the realisation that promotion has less to do with merit than with politics and semi-acknowledged quotas of top jobs for various countries. That explains why there are so many choirs, book clubs or sports clubs for Eurocrats. These are clever, bored people. The town's defining ethos of anti-nationalism is often admirable. EU officials are easy to get on with, and a decent bunch in my experience. But it brings problems: I find a lot of people in this town at best naive about how much integration public opinion will accept, and at worst a bit hostile to democracy. Get a Brussels dinner party onto referendums, and hear people rave about the madness of asking ordinary people their opinions of the European project…"*

[56] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN –„…*In the reporting period, the .eu TLD continued to grow steadily in line with the other European country code TLDs. The .eu TLD has reached a total of 3.7 million registrations, making the domain the eleventh largest TLD in the world and Europe's fourth most popular ccTLD. This represents an increase of 0.3 million registrations since the last report submitted to the European Parliament and the Council. In Europe, only .de (Germany), .uk (UK) and .nl (the Netherlands) remain in a stronger position in terms of registration numbers"*

underlined that "*The largest markets for the .eu domain are Germany (30.4 %), the Netherlands (13 %), France (9.1 %), the United Kingdom (9 %) and Poland (6.5 %).*" Well, this information needs to be perceived in the light of data regarding 2015, i.e. it needs to be taken account the massive Denish, Finnish, French and German loss of interest in TLD .eu. Further, the EC Report 2013 proundly underlines that TLD.eu is used by citizens as well businesses and that SMEs from the EU enjoy websites attached to their domain from TLD.eu.[57] Again, the current data as well as published literature and article show that especially EU businesses, including SMEs, do not prefer TLD.eu and instead pick TLD .com, their ccTLD and perhaps a new gTLD.[58] A more extensive direct data collection would be highly desirable, but so far all indices, interviews and case studies suggest that „nothing is wrong is with TLD .eu, but it is just the 2nd or 3rd choice, rather plan B than plan A." This is worrysome for a myriad of reasons.

Firstly, this is worrysome in the light of preambules and leitmotifs of various official documents and espeically of the TLD.eu conception regulation, i.e. the Regulation 733/2002, which states „*The .eu TLD should promote the use of, and access to, the Internet networks and the virtual market place based on the Internet,… The .eu TLD should improve the interoperability of trans-European network*…" and most imporantly „*Through the .eu TLD, the Internal market should acquire higher visibility in the virtual market place based on the Internet. The .eu TLD should provide a clearly identified link with the Community, the associated legal framework, and the European market place. It should enable undertakings, organisations and natural persons within the Community to register in a specific domain which will make this link obvious. As such, the .eu TLD will not only be a key building block for electronic commerce in Europe but will also support the objectives of Article 14 of the Treaty*." Naturally, the Treaty is TFEU and Art. 14 provides that EU and EU member states „*shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.*"

[57] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN *–„…5.5. The profile of a .eu user Consumers register the .eu domain for many purposes (business, social activities, presence of institutions on the Internet, etc.). The latest report20 on the usage of websites with the .eu TLD shows that around 31.4% are business-related. For the third year in a row, .eu has demonstrated a strong business profile, confirming its unique position as a TLD for businesses and SMEs with a cross-border dimension. The report* concludes that the older generic top-level domains (gTLDs) still have distinct profiles. The main example is .org, which has a very high percentage of community websites. In this, the gTLDs differ from the national country code top-level domains (ccTLDs), which are all used for very similar purposes. .eu has a lot in common with both the ccTLDs and with certain gTLDs (mainly .net, but also .biz and .com)."

[58] MacGREGOR PELIKÁNOVÁ, Radka. Pojetí doménových jmen ve vybraných perspektivách a jejich důsledky. Ostrava : Key Publishing a Praha : MUP Press, 2014, 179 s. ISBN 978-80-7418-227-3.

Secondly, this is of concern in the light of the very low fee-pricing policy for TLD .eu. Namely, Registraiton and renewal of a domain name from TLD .eu is very cheap, definitely cheaper than for domain names from TLD .com and many ccTLDs of EU member states. For example one of the principal Registrars located in the Czech Republic, Active 24, offers registration services regarding domain names from many TLDs and the annual registraiton price is the lowest for TLD.cz (CZK 179) and TLD .eu (CZK 199), while for TLD .com (CZK 249) and TLD .de (CZK 300) are slightly more expensive and for TLD .nl (CZK 1690) and TLD .dk (CZK 1490).[59] Here, it needs to be repeated, that even EURid Report 3/2015 admits that the most significant loss of interest in TLD .eu occurs in Denmark, France, Finland and Germany. The partial conclusion in this respect is clear – people and businesses from these countries prefer to use other TLDs than TLD .eu even if this costs them significantly more. And as explained above, technically the domain and Website can be operated in a virtually same manner while using domain names from almost all TLDs. Having a domain name from TLD .com or TLD.de definitely does not make a better Internet access or nicer pages. Boldly, domain names and selection of TLDs do not have an impact on the technical interoperability of the system.

Thirdly, worrying also in the light of massive exports and expenses made in order to „push" TLD .eu closer to Europeans. EC Report 2013 goes in detail over the budget of EURid with respect to TLD .eu and indicates that from the EUR 13 million budget almost EUR 3 million goes for marketing![60]

Fourthly, this could spell trouble in the light of the official reaction. At the time, when the key goals and leitmotifs seem to be not met, when lowering prices does not help and when large marketing expenses do not generate more business, the members of the European Parliament have presented basically only one significant written question to the European Commission. This question was given by Georgios Papanikolaou from PPE on 13th November 2013 and concerned the language restrictions on the Internet, namely the IDN introduction by ICANN of Arabic, Chinese and Russian for expressing the TLD abbreviation, and

[59] Official Website of Active 24 – Ceník registrace domén. Available at https://www.active24.cz/produkty-a-sluzby/domeny/informace-a-cenik/

[60] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2013/0804 from 19th November 2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0804&qid=1450307420347&from=EN - „ *The key financial aspects of the Registry remained stable in 2011 and 2012. Both the revenues and costs of the Registry have been around €13 million for both years. Consequently, the net financial result has been more balanced than in previous years with a surplus to the benefit of the EU budget of €772,892 for accounting year 2011 and €443,117 for 2012.Changes in the budgeted and actual costs of the Registry were closely scrutinised by the Commission, in particular costs relating to marketing (€2.8 million in 2011 and €2.7 million in 2012) and human resources (€4.0 million in 2011 and €4.4 million in 2012). The increase in costs was justified by the need for enhanced quality of service and increased security levels. The Registry maintains four types of financial reserves: depreciation, investments, social liabilities and legal liabilities. Over the reporting period, the total level of reserves remained stable: €5.4 million in 2011 and €5.0 million in 2012. At the end of 2012, this total was divided between the reserve for depreciation (€1.0 million), the reserve for investments (€0.5 million), the reserve for social liabilities (€2.7 million) and the reserve for legal liabilities (€0.8 million). Furthermore, a provision of €150,000 was added to promote and incentivise the Alternative Dispute Resolution.*

thus omitting Greek. The answer to this question was made by Ms. Kroes on behalf of the European Commission on 9th January 2014.[61]

The numbers speak more than words, at least the message generated by statitics regarding the number of domain names within TLD is self-explanatory and thus it is extremely illustrative to underline the number and data provided by DomainTools. There were in December 2015 as follows: 1. TLD .com 124 million, 2. TLD .tk 28 million, 3. TLD .net 16 million, 4 TLD .de 14 million, 5. TLD .org 11 million, 6. TLD .uk 9 million, 7. TLD .cn 9 million, 8. TLD .info 5 million, 9. TLD .ru 5 million, 10. TLD .nl 5 million, and 11. TLD .eu 4 million. [62]

The situation is getting truly complex and needs a serious reaction. In addition, the two-year perioed between European Commission reports just expired and thus the European Commission published in December 2015 her new latest Report to the European Parliament and the Council "EC Report 2015."[63] Interestingly, the EC Report 2015 is optimistic and definitely not worrysome and filled with positive statements such as "*Over the past nine years, the .eu country code TLD profiled itself as an innovative and modern extension, very much able to catch up both with the TLDs which have been in the domain environment since the late nineties and to compete with the new generic Top-Level Domains (gTLDs) that have been introduced in 2014. At the end of the first quarter of 2015 (Q1 2015), the .eu TLD was the sixth largest country code TLD (ccTLD) in the world. With almost four milion registrations, the .eu TLD has become a*

[61] Question for written answer E-01863/13 Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1450307420347&uri=OJ:JOC_2014_228_R_0001 Written quesitons - Question for written answer E-012863/13 to the Commission Georgios Papanikolaou (PPE) *(13 November 2013) Subject: Language restrictions on the Internet Akram Atallah, who is responsible for domain names at the global Internet management authority, the Internet Corporation for Assigned Names and Numbers (ICANN), has announced the first four new endings for online domains in Arabic, Chinese and Russian whilst a further 1 400 new suffixes are to be created. The new suffixes are expected to be available for use in about one month, with the aim of creating a globalised Internet, free of linguistic and geographical restrictions.*
In view of the above, will the Commission say: 1. Has it taken similar steps regarding the availability of new suffixes in most European languages? How has the lack of availability of these affected digital literacy in Europe to date? 2. What impact does it expect this development to have on the digital industry? Answer given by Ms Kroes on behalf of the Commission (9 January 2014) The Commission implement the Top Level Domain '.eu' (Regulation 733/2002) through the Registry Operator EURid which already implements Internationalised Domain Names (IDNs) which are scripts that are different from the Latin script to promote choice and diversity in the domain name space. For the Commission IDNs is an essential building block for creating a truly multilingual Internet and to boost functionality and user experience. The introduction of IDNs at country level was a positive development towards fostering multilingualism and providing new opportunities to access information for those who do not use the Latin script in their language. IDNs have brought about several improvements in terms of digital literacy and new content. Please see EURid-Unesco report on the matters (http://www.eurid.eu/en/about-us/publications/insights-research-reports). Currently country code IDNs are offered in all languages of the EU. The EU has also applied to ICANN to obtain the Cyrillic and the Greek string versions of .eu. The scripts of the 23 EU languages are supported under .eu and therefore, we see the relationship between local language and geographical location in the IDN registration patterns, boosting the production of more local content. It is notable that within two years of IDNs becoming available at least 3.5 million registrations have already been carried out. In addition, IDNs are expected to create a huge expansion on the Internet as multi-lingual communities will be able to be online.

[62] Official Websiste of DomainTools - http://research.domaintools.com/statistics/

[63] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2015/680 final from 18 December 2015. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:680:FIN&qid=1450548162867&from=EN

valued option for Europeans when choosing a domain name for their Internet presence." It is tempting to scarcastically add that TLD .eu has become a second option for Europeans, a mere plan B just in case, and definitely it is not the desireable TLD for Germans, Dennishs, Dutchs, etc. Even more saracsm could be offered with respect to the budget and expenses for marketing – from the constat EUR 13 million goes even more for marketing than before, i.e. EUR 3 million, [64] with the result that the net result is worse and the number of domain names in TLD .eu declines. Well, this is not perceived as a problem or issue by the EC Report 2015 which passes on it and rather discusses the final rejection of the Czech Company for the domain name application „dotace.eu" submitted in the Sunrise period.[65] Thus, the only true issue is for the EC Report 2015 the chronically unsuccessful battle of EURid with ICANN for IDN for TLD, i.e. to allow Greek alphabet to be used not only before but as well after the last dot. 66 Well, this is the key issue for the European Commission and certain members of European Parliamant, but does this truly matter to Europeans and the EU, is this really the biggest challenge of TLD .eu? Similarly, it is hardly possible to enthusiasticle endorse the conclusion of the EC Report 2015 proclaiming "*The .eu TLD and its Registry have shown that they are able to cope very well with the challenges to date, although the environment is*

[64] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2015/680 final from 18 December 2015. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:680:FIN&qid=1450548162867&from=EN „*....and costs both around €13 million a year. Consequently, the net financial result was more balanced than in previous years with surpluses of €535,017 and €76,953 for accounting years of 2013 and 2014 respectively to the benefit of the uropean Union budget. The Commission scrutinised closely changes in the Registry's budgeted and actual costs in particular as regards marketing (€2.8 million in 2013 and €3.0 million in 2014) and human resources (€4.7 million in 2013 and €4.4 million in 2014). The increase in marketing costs in 2014 is due to the high number of registrations, and therefore increased contributions to the co-funded marketing fund and new awareness nitiatives linked to the fact that residents of Iceland, Liechtenstein and Norway became eligible to register .eu domains..."*

[65] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2015/680 final from 18 December 2015. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:680:FIN&qid=1450548162867&from=EN *„The Sunrise application by the Czech company Dotace was rejected by the validator (and EURid) for lack of sufficient proof of a prior right to "Dotace". The CAC confirmed EURid's rejection of the dotace.eu domain name in its decision (Case 04281). The domain nameapplicant subsequently appealed before the Brussels Court of First Instance. When the Claimant refused to sign a settlement agreement, EURid filed a claim for vexatious court proceedings in order to be able to re-activate the proceedings and get a final outcome.In its judgment of 24 October 2014, the Court of First Instance ruled entirely in favour of EURid...."*

[66] EUROPEAN COMMISSION Report from the European Commission to the European Parliament and the Council On the implementation, function and effectiveness of the .eu Top Level Domain COM/2015/680 final from 18 December 2015. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:680:FIN&qid=1450548162867&from=EN *The .eu TLD model has been implemented successfully and is operating effectively. Over the past two years, the .eu TLD has strengthened its position as one of the biggest and most popular TLDs in Europe and the world. It remains successful despite the continued, albeit slower, growth of the 28 Member States ccTLDs and the increased availability of gTLDs, with which the Registry has been able to cope thanks to the quality label associated with the .eu TLD. Five years after EURid's application for the .eu string in Greek and Cyrillic, ICANN has not approved the Greek .ευ on the grounds that it is confusingly similar to other strings in upper case. The Commission has repeatedly urged ICANN to complete this process as soon as possible. It has stressed that the rules for a 'permanent' IDN application procedure should be set out so as to avoid undue delay. This is one of the public policy issues that the Commission will continue to raise in the Governmental Advisory Committee, which provides public policy advice to ICANN, as well as in other ICANN constituent bodies....."*

expected to be even more competitive in the future. The Commission has a regular and constructive dialogue with the Registry to investigate and identify possible ways of dealing with the new DNS landscape while keepingthe .eu space secure, reliable and worthwhile for current and future stakeholders … The DNS environment has recently undergone one of the its biggest changes of the past two decades. Hundreds of new gTLDs have been launched in the market sometimes creating confusion among registrants and registrars. At the same time, the advent of social media has led to a dropping-off of interest in domain names, as younger Internet end users and dynamic new companies prefer to communicate their online presence via the faster social media avenues....“ Do we understand the current dynamic TLD and social media dynamic? Do we speak about the same TLD, i.e. TLD .eu? If yes, then perhaps something “Something is rotten” not in the state of Denmark,[67] but in the EU.

Conclusion

The Internet significantly influences the life of Europeans and European busineses, and its appropriate use is critical for European integration,[68] especially if e-platforms such as Websites are used.[69] Europe 2020 is well aware about it, and the EU actually knows it for over 15 years. Since second and lower level domains within the ideal TLD for e-business, TLD .com, were predominantly taken by USA businesses, and thus businesses from the EU had to take either less attractive-for-business domains from TLD.com or domains from another gTLD or from their ccTLD,[70] the EU made a strategic move to create own TLD, TLD .eu, and made a not-for-profit organization, EURid, its Registry. The TLD .eu has been used as a flagship and the allegedly ideal Domain platform for Europeans, desired by Europeans and used by Europeans putting on it their Website. It is a paradise of an eternal growth. Well, if it is a paradise, then now it is raining in this paradise. Despite all efforts, it seems that the gTLD .com with a total of 124 million, and ccTLDs such as TLD .de with 14 million registered domain names are much more attractive than TLD .eu.[71] In other words, Europeans and their entities and businesses, especially SMEs, are interested in an ideally worded domain name with TLD .com, and if this is taken and not easily purchasable, then the second choice is in “their” new gTLD or their own ccTLD. [72]

[67] SHAKESPEARE, William. Hamlet (1.4), Marcellus to Horatio.

[68] MacGREGOR PELIKÁNOVÁ, Radka. Internet My Dearest, What Type of European Integration Is The Clearest? *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, 61(7): 2475-2481. ISSN 1211-8516. Permanently available at http://dx.doi.org/10.11118/actaun201361072475

[69] MacGREGOR PELIKÁNOVÁ, Radka. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly*, 2013, 3(4): 311-323. ISSN 1805-8396 (Print), ISSN 1805-840X (Online).

[70] MacGREGOR PELIKÁNOVÁ, Radka, MacGREGOR, Robert. General doctrines and principles of EU law and their impact on domain names. *AA Law Forum*, 2015, 6, 29-45. ISSN 1804-1094.

[71] Statistic informatik extractef from the DomainTools Website - http://www.domaintools.com/statistics/tld-counts/

[72] MacGREGOR PELIKÁNOVÁ, Radka. Domain names – *Their nature, functions, significance and value*. Saarbrücken, GE : Lambert Academic Press, 2014, 273 p. ISBN 978-3-659-62653-1, p. 192. Available at https://www.lap-

And if somebody still wants additional domain names, then let´s take TLD .eu.

The EU needs to be appreciated for its courage to take an active step toward their "own" domain names and for its self-reflection along with the capacity to resist the temptation to over-regulate and bureaucratically micromanage.[73] Businesses, consumers … as a matter of fact, all Europeans need a strong support from the EU for their existence in the global environment and for their contribution to the proclaimed sustainable developement.[74] But the EU should be complemented on the manner how it pushes TLD .eu. Marketing is going, prices are decreasing … yet more and more Europeans from critical EU member states do not want domain names from TLD .eu. Is this the fault of the EURid and European Commissions? Or, even worse, is this inevitable and is merely an indication about the decline of the trust and interest in the EU by Europeans?

The project TLD .eu has been prospering, but now is slowing down. However we do not have a crisis, do we? Or, do we have a hidden crisis? What are the prospects?[75] So, TLD .eu and European integration, who are you and *quo vadis*? Ostentatious but fairly empty Lisbon and Europe 2020 political proclamations about a more democratic, competitive and innovative EU closer to citizens bring unimpressive results and in the light of current events, such as immigration, internal security, etc. a criticism of political correctness and detachment from real life is more to be heard. A low profile model employed by TLD.eu, which relies on delegation and contractual instruments operated by private players and which respects economic, legal and technical aspects needs would be more fruitfull[76] than relying on Europeans running for TLD .eu, and EU as such, without asking. It seems that the trust, perhaps enthusiasm, is evaporating while bureaucracy is growing and our Christian foundation and its principles are disregarded and played down. In such an environment hardly the European integration and TLD .eu could prosper, and this even if they are cheaper than other options. Definitely more research needs to be done and it is truly time to make the European Commission listen to Europeans and recognize the true values on which the European civilization is based and can prosper. After all, Europe 2020 was launched to create the conditions for smart, sustainable and inclusive growth, was not it?! And certainly, such a growth cannot be achieved in the current Europe without bottom-up approach and engagement in an active and respectfull dialogue with all stakeholders. And exactly the endeavors towards such an approach and engagement should

publishing.com/catalog/details/store/gb/book/978-3-659-62653-1/domain-names?search=macgregor

[73] MARZETTI, M. IP Education – what next? *WIPO Magazine*, 5/2011, ISSN 1020-7074, p. 25

[74] MacGREGOR PELIKÁNOVÁ, Radka. Právní a ekonomické aspekty domény nejvyšší úrovně .eu. *Acta MUP*, 2011, 2 (2), s. 14-37. ISSN 1804-6932.

[75] MacGREGOR PELIKÁNOVÁ, Radka, PACLÍK, Miroslav. European Integration Odyssey – the Ship Sails on ... but Where? *Journal on Legal and Economic Issues of Central Europe*. 2013, 4(1): 40-48. ISSN 2043-085X.

[76] MacGREGOR PELIKÁNOVÁ, Radka. Internet My Dearest, What Type of European Integration Is The Clearest? *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, 61(7), pp. 2475-2481. ISSN 1211-8516. Permanently available at http://dx.doi.org/10.11118/actaun201361072475

be the mandatory mission of the European Commission in 2016!

Authors:

JUDr. Radka MacGregor Pelikánová, Ph.D., LL.M., MBA is an academic researcher and lecturer at Metropolitní univerzita Praha.

Robert Kenyon MacGregor, MBA is a Free-lance writer.

AA Law Forum
Published by John H. Carey II School of Law
No. 7, Spring 2016

Recast Brussels Regulation and the Challenges of Forum Shopping

Pietro Andrea Podda and Massimiliano Pastore

Introduction

Our paper describes and comments on certain issues related to "Forum Shopping", a term of art used by courts and lawyers to indicate the practice of private litigants, especially commercial, to strategize the choice of the forum where a lawsuit is brought. This forum may even be at variance with the previously agreed choice of forum that the litigants made under the so-called 'jurisdiction agreement' or 'forum selection clauses'. Loopholes continue to exist in EU and international law that allow such practice, which we hold is mostly deplorable because it promotes Opportunism.

Understandably, a litigant will choose to start a legal action in a location (venue) which offers particular advantages. For example, a certain venue may be particularly sympathetic to the arguments brought up by the plaintiff rather than the defendant. The costs of commencing a lawsuit can be different across countries thanks to the different structures of filing fees (e.g. country A's court system charges the plaintiff a percentage of the value of his or her claim, while country B requires a flat fee). A plaintiff may promote a legal action with the aim of barring the defendant from starting his/her own legal action in another location. Multinational corporations are able to analyze and compare the pros and cons of filing a lawsuit in different countries according to different factors, such as time, costs and procedural issues – especially rules of evidence.

To a limited extent, Forum Shopping can be acceptable because it saves honest litigants from the difficulties of having to litigate their cases in a hostile, biased, expensive or slow forum. As the English judge Lord Denning said: *"You may call this 'Forum Shopping', if you please, but if the forum is England, it is a good place to shop in, both for the quality of goods and the speed of service."*

While selecting a forum among different venues may be a legitimate part the plaintiff's strategy, we hold that most Forum Shopping is based on, and encourages, Opportunism, which represents a factor contributing to high Transaction Costs (the cost of finding and interpreting market information and enforcing contracts, see Coase 1936, 1960; Parada, 2002; Podda and Tsagdis, 2006, 2007; Podda, Bulka and Tairi, 2010; Podda 2010, 2015). Transaction Costs represent a serious deterrent to international trade because these particular types of costs undermine the safety of transactions (North 1990; 2005). Developed or efficient institutions contribute to decreasing the level of Transaction Costs in an economy. Institutions are the formal rules (Formal Institutions) and informal norms (Informal Institutions) which regulate human behaviour, including economic transactions. We will restrict our discussion to formal rules, which are basically written rules, often having a legal connotation. Formal Institutions are suitable to

decrease Transaction Costs when these rules are clear, consistent and leave little room (ideally, no room) for loopholes that can be exploited by agents prone to Opportunism. Opportunism leads to a rise of Risk and Uncertainty of transactions, thus discouraging parties from entering into transactions (problem of adverse selection and moral hazard).

Our paper highlights how, for a long time before the revision of the relevant rules and to a minor extent also after, EU formal institutions have not been sufficiently developed to block Opportunism. Private litigants have been able to exploit legal loopholes existing in the current international and EU legislation in order to promote a legal action in a location which is different from 1) the one eventually agreed upon by the parties to a contract or 2) the location having territorial competence on the basis of the EU rules. In other words: although 1) parties may well agree in advance regarding the location where they (eventually) may solve their legal disputes or 2) the very matter may be covered by EU law, it is still possible that one of the parties might launch an action somewhere else, trying to avoid (more or less successfully) the contractually-set or EU-imposed provision. These particular types of practices may create serious annoyances to certain agents.

Our paper investigates the issue and is organized in the following way. The first section will focus on the problem of Forum Shopping. The second section will discuss the revised EU Regulation 1215/2015, which aims at regulating the choice of the forum. This section describes how the current Regulation is moving ahead with awareness of the problem and the capacity to prevent Forum Shopping, even if some specific loopholes have not (yet) been completely rectified. The revised Regulation contains provisions aimed at solving some specific opportunistic practices, even if there is still room for further improvement. Conclusion and references follow.

The Opportunistic Choice of the Forum

The choice of an appropriate forum in which to bring an eventual legal dispute represents one of the trickiest challenges for International Trade operators. The issue is of paramount importance because, contrary to intra-border trade, different courts may in principle claim jurisdiction and issue conflicting judicial decisions that simultaneously remain legally binding on the parties. In theory, International Private Law is designed to prevent such situations. International Private Law is that particular branch of law aimed at setting in advance which national court has jurisdiction over a dispute, if the litigants are based in different states, or when legally relevant facts or circumstances (i.e. the place of signature of a contract) have taken place in a country different from the one where at least one of the parties lives, resides or does business. Although International Private Law is largely based on international treaties, it remains, in spite of its denomination, national law, in the sense that each domestic legal system contains its own set of national rules governing the allocation of cases involving an international element (e.g. one of the litigants resides outside of the jurisdiction, or the agreement in dispute was executed abroad). Consequently, the possibility of conflicting

decisions remains, especially where the various national legal systems implement treaty provisions differently.

The above scenario ultimately represents a risk for international traders because this type of economic agents may feel threatened by the uncertainty regarding the territorial allocation of a dispute. This complication definitely leads Transaction Costs upward, thus discouraging economic exchange (namely import-export in our case). Uncertainty increases even further considering the fact that enforcement of judicial decisions in a foreign country is often lengthy, if even possible. These two complications represent a hurdle for international traders and offer room for Opportunism, which is also a factor leading to higher Transaction Costs.

States are obviously aware that the two above-mentioned factors are a deterrent to international trade and have devised some (imperfect) solutions. There are international Agreements on the inter-country recognition of judicial decisions as well as on the recognition of the territorial jurisdiction of another state. Nonetheless, these Conventions are not universal and there is still wide room for uncertainty when it comes to allocating cases on the basis of domestic implementation of International Private Law. Companies are also well aware of the risk and for this reason the location in which an eventual dispute can be taken is often decided by the parties through contractual agreement – i.e. forum selection clauses. However, these clauses can be defeated or circumvented (see the next section), with a clear negative impact on the legal certainty of international arm length transactions.

Confusion about the domestic court that has jurisdiction over a case invites opportunistic behaviors from the side of traders. Opportunistic parties may start a case before a court they feel will show a particular sympathy to their particular arguments, hoping to obtain recognition of an eventually favorable judicial decision in the country of the defendant. Another possible opportunistic strategy aims at exploiting those international legal rules that, once existing, preclude a national Court from reviewing a case that is already under examination in another country.

The Opportunist may maliciously sue a foreign defendant by choosing a forum that has no jurisdiction over the case but is slow enough to give him or her sufficient time to take other legal steps and ‘knock down’ the defendant (e.g. drawing a bank guarantee, repossessing an asset, obtaining a temporary court order) before the court rejects the case on grounds of lack of jurisdiction. Another opportunistic plaintiff may commence legal actions in a forum only to withdraw or seek a stay of proceedings later during the dispute.

For the reasons outlined above, the practices described are surely detrimental to the safety of economic exchange. The necessity of devising solutions is well known to EU lawmakers, and local and international authorities. English judge Lord Reid said that Forum Shopping is “undesirable” and “there is no injustice in telling a plaintiff that he should go back to his own courts”. The next section will critically discuss this issue and address how

these authorities have regulated the matter and what (now not so many) limitations are still marring their intention to curb Transaction Costs and prevent Opportunism.

Forum Shopping: the Brussels Regulation

The EU-devised legislative instrument that addresses the allocation of territorial jurisdiction and should prevent Forum Shopping is now the EU Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter "Regulation" or the "Brussels Regulation"). The Regulation is based the original Brussels Convention of 27 September 1968 and the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988. Recently, the Brussels Regulation has been amended, with the new rules becoming effective as of January 2015. We maintain that the changes cure some defects, which had left room for Forum Shopping, even if the space for opportunistic choices remains. The goal of the Brussels Regulation is to regulate the allocation of jurisdiction when the parties reside in different states. Its rules are quite detailed and the default principle is that the competent court is the one where the defendant resides or has domicile. Nonetheless, the applicability of this general principle is moderated by a number of possible exceptions. The Regulation 1215/2012 is structured in the following way: the first part gives the Scope and the Definition, the second chapter of the Regulations focuses on jurisdiction. This second chapter is divided into 10 sections. In the 7th section (on the on the Prorogation of Jurisdiction), there are Articles 25 and 27 which contain provisions we will discuss. The third chapter of the Regulation is focused on Recognition and Enforcement, whereas the fourth chapter is titled Authentic Instruments and Court Settlements. Other chapters regulate General Provisions, Transitional Provisions and Relations with Other Instruments.

Before the last revision, complications were manifold. Our discussion will start from the analysis of Article 25 of the Regulation, which is aimed at recognizing the freedom of parties to select a particular jurisdiction, thus moving away from the default rule. This is known as the 'jurisdiction agreement' in the EU and UK, and as 'forum selection clauses' in the US.

Article 25 of the Regulation, in its new version effective since January 2015, provides that:

If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

At first, some encouraging comments are presented. This provision simplifies the previous regime (valid before the changes effective since

2015), which made jurisdiction agreements an option only where one of the contracting parties had its domicile in an EU member state. The unfortunate practical effect has been the proliferation of long and costly procedures aimed at ascertaining the actual domicile of the parties. Courts were stuck over the domicile issue for months, if not years, also thanks to the local systems of appeals and reviews.

Certainly, the effectiveness of private jurisdiction agreements continues to be marred by the possibility that a court could find it null and void. Nonetheless, the problem of nullity is usually determined on the basis of the national legislation and legal tradition of the country where the chosen court is located, which seems to add in terms of certainty. This happens also because a party may not circumvent the validity of the territorial clause by trying to obtain a declaration of nullity in another (EU) country.

A further positive note is spent describing that the validity of jurisdiction agreements remains isolated and independent from the validity of the underlying contract: an eventual claim against the validity of the contract does not impact the validity of the jurisdiction agreement (Garbey, 2015). Courts within the EU, if asked to rule over a legal dispute, must stay proceedings in the presence of a contractual agreement conferring jurisdiction to a different EU member state court, this rule cannot be circumvented by claiming the eventual invalidity of the contract in other jurisdictions than the one mentioned in the agreement. This reinforces the certainty of the jurisdiction agreements and diminishes the room for opportunistic Forum Shopping.

A further positive aspect of the new version of the Regulation is the revision of the *lis pendens* rule (Section 9 of the 3rd Chapter), in order to counter the inconvenient phenomenon of the so called Italian torpedo, (see below). The previous version of the Regulation contained a rule which was defined as *lis pendens* (pending dispute), according to which courts were to automatically stay proceedings when the same dispute was already taken before another Member State's court. This rule, in theory, appears wise and was clearly aimed at preventing parties from bringing multiple litigation actions in different States. A particular Member State's jurisdictional organ was bound by this principle even in the presence of explicit contractual provisions conferring jurisdiction to this very organ (see the case Eric Gasser GmbH v MISAT Srl Case C-116/02).

Before moving to highlight the negative practical consequences of this rule, we will spend some time to explain the rationale for its existence. Mutual trust among Member States is a cornerstone of the whole process of European integration and is applicable in various areas (i.e. the European Arrest Warrant, which has introduced the mandatory EU-wide execution of such Warrants, and the recognition of national standards in the absence of European rules in the field of the freedom of Circulation of Goods). The general presupposition is that Member States are equally worthy of trust and equally able to enforce law effectively, fairly and efficiently. On the basis of

this principle, the idea underpinning the *lis pendens* rule was that litigants should remain free, to a certain extent, to commence their lawsuits in the forum they regard appropriate, but it would be up to the court where the suit was filed first to solve the issue by taking or refusing jurisdiction. In the meantime, in order to avoid a chaotic proliferation of different judicial decisions on the same case, any other court should freeze its proceedings: 'pending the case' (*lis pendens*) in one court, the other courts may not proceed.

However, the *lis pendens* rule can be abused. As already seen in other occasions, those EU authorities introducing this very principle failed to take into due account the existence of fundamental institutional disequilibria among Member States. There are States (e.g. Italy, Greece) where the timeframe for a judicial decision, even limited to the issue of jurisdiction, is intolerably long, with obvious consequent hurdles imposed on the defendant, who is in the meantime prevented from obtaining justice in the (EU) location chosen on the basis of the contract. This is the problem that took the suggestive name of Italian torpedo among intellectual property lawyers and academics. An innocent litigant, who wants to defeat a groundless lawsuit that has been sued in a slow court lacking jurisdiction must wait until that court concludes that it has no jurisdiction. The metaphor is that because the torpedo boat is slow but is at the front of a convoy of ships, all the other ships in the convoy cannot travel faster than the torpedo.

On a deeper analysis, the torpedo practice is not riskless for the Opportunist, because eventually, once the declaration of incompetence comes and the case is solved by the competent court, legal costs may be significant. Nonetheless, traders who are prone to the risk of facing significant long-term future legal costs may well regard a torpedo lawsuit as a convenient option to push a contractually weaker party to accept an out-of-court settlement on very unfavorable terms.

The unfortunate effects of a rigorous application of the *lis pendens* doctrine became too visible and finally EU lawmakers have wisely decided to moderate the very principle, allowing some exceptions from the general specific *lis pendens* rule. Clearly, the rationale for the introduction of these exceptions has requested a trade-off between the principle of equal trust among Member States and the need to protect the fairness and safety of economic transactions. The courage shown by the legislators deserves to be praised and demonstrates contact with reality rather than adherence to unreasonable political dogma.

For the sake of honesty, some authors (Garvey, 2015) suggest that there could be a further problem. This may occur when a Court seized of a given case, despite the existence of a different contractual jurisdictional allocation, may itself contest the existence of the jurisdictional clause (and not its validity, as this would still be under the scrutiny of the contractually-picked Court). However, in spite of potential extreme cases, we consider this particular scenario as mainly theoretical and not able to represent a serious hurdle to jurisdictional certainty in the real economic world. The professionality of lawyers in

charge of drafting contracts and the expertise of professional judges within the EU appear as a credible guarantee against such an occurrence, unless future cases prove us wrong. We also consider that further EU legislation on the criteria presiding over the declaration of the existence of a jurisdictional clause would risk being over-extensive without even solving the very theoretical problem: a Court could always find interpretative doubts or could itself interpret EU Law its own way without even referring the case to the Court of Justice. Finally, while being well aware of the imperfection of humanly-devised legislation, we feel that at the moment the revised version of the Regulation represents significant progress, as far as the fight against the *Italian Torpedo* practice is concerned. Hence, it represents a step ahead to prevent Forum Shopping and curb Transaction Costs, thus reinforcing certainty of Transactions.

Nevertheless, there are still gaps that leave some room for uncertainty and, eventually, Opportunism. The Brussels Regulation, even after revision, does not explicitly provide for the possibility that the parties agree to accept the jurisdiction of a non-EU State in the event of disputes. In this case, the Regulation does not state that their contractual choice will prevail over the default rule (i.e. the defendant should be sued in his/her country). Even the last version of the Regulation does not always prevent a national court of an EU country from taking jurisdiction over a case notwithstanding the existence of a dispute that is already being litigated in a non-EU country. (Clearly, eventually, particular national practices may entail estoppel, in the sense that the national Court itself would be expected to declare its own lack of jurisdiction. Still this would be due to national rules or practices and would not represent the result of EU legislative action.) EU Member State courts keep enjoying discretion over the requirement to stay proceedings if a non-EU court has previously opened a case regarding the same dispute. The decision to decline jurisdiction in favor of a non-EU country remains conditional on the assessment of broad conditions. One of these is whether recognition and enforceability of the non-EU judicial decisions can be expected.

In theory, the requirement that the a court outside the EU must have opened the case before the case is heard in front of a EU Member State court could again promote the launching of opportunistic litigation with EU Member State courts. It would be supported by the hope or expectation of defeating a jurisdiction agreement where the same litigant had agreed to submit disputes in a non-EU court. Obviously, this would be a further occurrence able to encourage deplorable Forum Shopping and leading to higher Transaction Costs. On the basis of this, one may argue that EU legislators still have a way to go concerning their struggle against vexatious Forum Shopping practices.

Garvey (2015) discusses how British Courts are oriented towards taking cases brought before them into their own jurisdiction notwithstanding the existence of a clause conferring jurisdiction to a Third State (see the case Plaza BV v The Law Debenture Trust Corporation PLC ([2015]). As discussed above, that the Brussels Regulation is silent regarding the protection of a jurisdictional contractual clause conferring competence to a

Third State's court is certainly not prone to curb Transaction Costs, because it fosters legal uncertainty and leaves room for vexatious Forum Shopping.

Nevertheless, we intend to spend some time defending the current version of the EU Regulation. The lack of a clear extension of the protection of the jurisdictional contractual choice may find a rationale in the impossibility to apply the principle of mutual trust among countries outside the EU. Political correctness aside, honesty and data implore us to accept that some court systems are tainted by larger inefficiency, incompetence and corruption than seen in most EU states. Indeed, this possible explanation would need to resist against a particular objection. A jurisdiction agreement (or forum selection clause) constitutes a choice made by private litigants that are supposed to make informed decisions before agreeing to submit their disputes to a national court system, however tainted by a negative reputation it may be. The litigants should be aware of the risks and traps that are embedded in their choice of jurisdiction. Nonetheless, it is possible to easily defeat such an objection by arguing that parties are not necessarily acting at the same level in terms of bargaining power. EU legislators may have opted to protect weaker parties that are unable to negotiate or avoid unfavorable jurisdiction agreement terms when dealing with large corporations. By refusing to accept the automatic recognition of non-EU judgments, the EU may have desired to implement a policy protecting 'weaker' litigants.

As for recognition of extra-EU jurisdictional clauses, eventually EU authorities and courts may proceed on the basis of individual agreements that are in place with the different extra-EU countries, especially with the largest commercial partners of European Union Member States (i.e. USA). This solution, far from being perfect, appears to be reasonable, even if it leaves too much discretion to the individual courts of each Member State. Nonetheless, EU legislators seem to have adopted a pragmatic approach in this situation as well. This particular approach is based on the awareness of the existence of actors that are able to impose territorial clauses whose automatic recognition would entail unfair results and would also jeopardize the safety of economic international exchange. A case-by-case approach, based on individual agreements, allows certain flexibility, even if it sacrifices legal certainty and open spaces for a risk. This particular risk would be that Transaction Costs may not be curbed when the decision regarding the recognition of territorial clauses are left to the discretion of individual courts. A reduction of Transaction Costs would be possible only if these agreements between EU and Third Countries had clear codified rules regarding the recognition of extra-EU territorial competence and related judicial pronouncements.

Conclusion

This paper has discussed the Regulation of Forum Shopping and highlighted how the Regulation 1215/2012 represents a step ahead in the prevention of the phenomenon. The innovative provisions introduced by the recent revised text of

the Regulation have taken the limitations of the previous version into a certain account and have attempted to rectify them. Obviously, the real effectiveness of this revised Regulation at preventing Forum Shopping will be assessed only with hindsight. However, the possibility offered to Member State Courts to continue with their proceedings even when a litigant has started an action in another location appears as a wise, expedient tool to counter opportunistic tactical delays which undermine the safety of transactions. Also the non-automatic extention of the respect of the jurisdictional clause to third countries' courts can be read as a recognition of the traps eventually embedded. So far, the European Union seems to go in the right direction as for its intention to curb the phenomenon of Forum Shopping and protect the safety of transactions.

References

Coase, R. H. 1937, "The Nature of the Firm", *Economica,* vol. 4, no. 1, pp. 386-405.

Coase, R. H. 1960, "The Problem of Social Cost", *Journal of Law and Economics,* vol. 3, no. 1, pp. 1-44.

Garvey, S. 2015, "Brussels Regulation Recast: are you ready?" broused at http://www.allenovery.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx on the 15th March 2015.

North, D. C. 1990, *Institutions, Institutional Change and Economic Development*, Cambridge University Press, Cambridge.

North, D. C. 2005, *Understanding the process of Economic Change,* Joel Mokyr Editor, Princeton.

Parada, J. J. 2002, "Original Institutional Economics and New Institutional Economics: Revisiting the Bridges (or the Divide)", *Oeconomicus*, vol. 6, no. 2, pp. 43-61.

Podda, P. A. 2015, "The impact of Institutional Distance on FDI in the Czech Republic", *Acta Oeconomica Pragensia,* Vysoká Škola Economická, Prague (accepted and forthcoming).

Podda, P. A. 2010, "Foreign Direct Investment: the Visegrad Countries at a Cross-Road", *Proceedings of the Conference Economic Crisis,* University Uninova, Bratislava, 2010.

Podda, P. A., Bulka, L. and Tairi, M. 2010, "Law Extensiveness and Law Effectiveness in CEECs", *Bulletin of the School of Law of the Anglo-American University in Prague,* 2010.

Podda, P. A. and Tsagdis, D. 2007, "A desegregated analysis of the impact of corruption on FDI in the Czech Republic", *Proceedings of the 15th conference on Business and Marketing Strategies in Central and Eastern Europe, High School of Economics of Vienna and De Paul University of Chicago,* Vienna, December 2007.

Podda, P. A. and Tsagdis, D. 2006, "The importance of host institutions for foreign investors: a qualitative enquiry in the Czech Republic"

Proceedings of the 14th conference on Business and Marketing Strategies in Central and Eastern Europe, High School of Economics of Vienna and De Paul University of Chicago, Vienna, December 2006.

Authors:

Pietro Andrea Podda, PhD, is an academic working for the Anglo-American University.

Dr. Massimiliano Pastore, MA is a dual-qualified Italian attorney based in Prague, and a lecturer at the Anglo-American University.

AA Law Forum
Published by John H. Carey II School of Law
No. 7, Spring 2016

Biblical People and Their Law

Jiří Kašný[1]

This short study is to explore basic characteristics of the people of Israel as the subject of the law in the Hebrew Bible. It also examines the basic forms of the laws in the Hebrew Bible. The source of the study is the text of the Tanakh itself, and it is presumed that a curious reader has the text of the Tanakh at hand. The study refers to some secondary literature so as to allow the reader to get engaged in a discussion beyond this short study.

The Hebrew Bible is an exceptionally complex source. It includes three collections of texts: Torah – Five Books of Moses, Neviim – Prophets, and Ketuvim – Writings. The Hebrew Bible is also called Tanakh, which is an acronym of the first Hebrew letter of **T**orah, **N**eviim and **K**etuvim. The organization of the texts in the Hebrew Bible does not depend on the chronological origin of them. For example, some of the proverbs in the Writings are historically older than some of the parts of the Torah and the Prophets. The organization of the texts does not depend on a geographical provenance. The organization of the texts is not based on their authorship. The Torah is attributed to Moses and he is recognized as prophet. The organization of the three parts does not indicate the importance of each of them, although the Torah always has held pride of place, the first position, and the name Torah might be used to refer to the Hebrew Bible as a whole. The organization of the Hebrew Bible into three parts corresponds to a process of completing each of the parts in the canon of the Hebrew Bible. The text of the Torah was made a complete whole in the era of Ezra, prior to 400 B.C. The books of the Prophets were completed and joined the sacred texts before 200 B.C. The Writings were completed as a whole of sacred texts most probably before 100 A.D.[2] On the other hand, the Torah, the Prophets and the Writings, i.e. TaNaKh never referred just to what had happened in the past, but also they are part of the living tradition of the Jewish community and, then the Christian community, up to the present time.

The Law in the Torah

The sacred texts of the Hebrew Bible include both narrative and discursive passages. It describes historical events, the genealogy of the people, preaching of the prophets, it captures the wisdom and experience of those who were living according to the JHWH's Covenant. The Torah also includes large passages of law. In fact, the word Torah can be translated as law although that gives but a partial meaning of Torah. The content of the word Torah also includes "guidance and teaching." A Greek translation of the Hebrew Bible, Septuagint, translates Torah as *nomos,* i.e. the created order.

[1] The author would like to thank Mr. Robert K. MacGregor, MBA for his valuable comments and suggestions.

[2] Raymond BROWN, „Canonicity" in: *The New Jerome Biblical Commentary*, Englewood Cliffs, New Jersey: Prentice Hall, 1990, p. 1037-1040.

According to the rabbinic teaching, Torah refers to a gift of a meaningful journey.[3]

The narrative and legal passages in the Torah are mostly organically interconnected: the narrative passages include the laws and commandments into the context of the events and the legal passages are part of the narrative of the historical events.[4] The narrative passages are not just simple material and chronological reports of the events but they aim at uncovering the meaning of the events. The legal passages are discursive and argumentative texts, they are rarely made of mere simple collections of rules, but they incorporate law in the life of the people. The legal norms have their story that is rooted in the community and not just in the experience of an individual, they are local and historical, not abstract and ahistorical. The narrative and legal texts are pivotal genres of the Torah.[5]

People of Israel

The community of the people can live meaningfully only according to law; the law makes sense in a community of the people. The law in the Hebrew Bible is based on the covenant of JHWH and the People of Israel.[6] It establishes a legally enforceable order of actions and relations of the people among themselves and toward JHWH. Legal order relates to a community in history. The people in the community hand the law down from generation to generation. Should the present community forget their laws and not hand them down to the next generation, such a community would lose its own identity. On the contrary, teaching law to the next generation is a crucial task of every community. Reading and learning the Covenant and the law based on it was a crucial task for the People of Israel.[7]

Law, in the Hebrew Bible, establishes a framework for the relations and actions of the People of Israel, people who were delivered from slavery in Egypt and bound to living in freedom in the land promised to Israel. The commandments and the prohibitions in the Torah are usually formulated in the singular and directed to an adult man. The law is mainly personal in character, i.e. it binds the members of the people of Israel regardless of the territory where they are living at the given moment. It only partially binds the foreigners that are living in the territory of Israel. Law, in the Hebrew Bible is exclusive in character, i.e. it forbids the people of Israel to submit to foreign local law should it rule in conflict with the law of Israel.[8]

The addressee and the subject of the law in the Hebrew Bible is primarily a free member of the People of Israel. The community of Israel was made of free people; every tribe, every clan and every family obtained a portion of land on their entry to the land of Israel. The king and other

[3] Jan HELLER, *Hlubinné vrty. Rozbory biblických statí a pojmů,* Praha: Kalich, 2008, p. 184-185.
[4] Assnat BARTOR, *Reading Law as Narrative. A Study in the Casuistic Laws of the Pentateuch,* Atlanta, Georgia: Society of Biblical Literature, 2010.
[5] Cf. The chapter „Law and Narrative in Exodus 19-24," in Joe SPRINKLE, *Biblical Law and Its Relevance,* Lanham, Maryland: University Press of America, 2006, p. 49-67 and Viktor BER, *Vyprávění a právo v knize Exodus.* Jihlava: Mlýn, 2009, p. 9–49.
[6] Jiří KAŠNÝ, „Základ legitimity práva v hebrejské Bibli," *Revue církevního práva* 59 (2014) 21-35.
[7] Dt 4,1-24.
[8] Lv 20,23 a Lv 18,3.

leaders in the community were the addressee and the subject of law, too, and they were not allowed to think that they were better than everyone else.[9] Kidnapping an Israelite and forcing them into slavery was forbidden and punishable by the death penalty[10] because individual freedom, as well as life, was JHWH's gift to Israel. Life in freedom was the default status as well as the destiny of the Israeli people.

However, the law also recognizes the status of a temporary serfdom, and that relates to an unfortunate situation, in which an Israeli man runs into debt and must sell himself or even sell the members of his family to pay off the liabilities.[11] According to the principle that the agreements must be kept, the law rules the obligation to discharge all liabilities and to pay the debt, even through one's work and at the cost of one's freedom. An insolvent man in debt must either pay his debt through his work as a temporary slave, or his relatives might ransom him and pay the debt for him. However, the law of the fiftieth Year of Celebration relativizes this obligation and it rules that, during that year, all property must go back to its original owner and the Israeli slaves must be released regardless of their fulfilled or unfulfilled liabilities. The law of the Year of Celebration relativizes the principle that the agreements must be honored because every member of the Israeli community was delivered from slavery in Egypt by JHWH and, therefore, belongs primarily to JHWH.[12]

The law in the Hebrew Bible also includes the institute of slavery. The Israelites were allowed to buy and keep foreigners as slaves.[13] The narrative texts of the Bible inform the reader that slave work was a part of the legal and economic order in Israel. Abraham owned slaves as part of his household. The kings of Israel used to employ foreign slaves forced to work. Ezra and other people of Israel returned from the Babylonian exile to Jerusalem together with a high number of slaves.[14] The Israeli army used to take prisoners of war, and make them slaves.[15] However, the law in the Hebrew Bible protects the life and integrity of these slaves so the slaves are clearly different from real property.[16]

The law in the Hebrew Bible protects the individual. However, it typically does not declare the rights of the individual, rather it imposes the obligations upon the strong toward the weak. Orphans, widows, foreigners, and the handicapped are mentioned repeatedly among the weak.[17] The law recognizes the legal aspects of the position of the orphans, the widows, and the foreigners. An orphan is an underage person who has lost the reliance and backing of the father, or some other adult person, and thus has lost the backing of the family. A widow is a woman that has lost her husband, and thus she has lost legal backing in her family relations and in the community. Even more difficult would be the situation of a widow who does

[9] Dt 17,18-20.
[10] Ex 21,16 a Dt 24,7.
[11] Cf. Ex 21,2; Dt 15,12-18; Lv 25,39-54 a 2 Kr 4,1.
[12] Cf. Lv 25,42.
[13] Lv 25,44-46.
[14] Gn 17,12-13.23.27; 1 Kr 9,15-21; Ezd 2,64-65.
[15] See Gn 34,29; Dt 20,10-14; Nu 31,7-12 a Iz 14,2.
[16] See Ex 21,20-21; Dt 23,15-16.
[17] David BAKER, *Tight Fist or Open Hands? Wealth and Poverty in Old Testament Law*, Cambridge, U.K: Eerdmans, 2009, s. 175-195 a 331-313.

not have a son who might carry on the name and the household of the husband that passed away. The widow in such a situation is protected by a levirate marriage.[18] The foreigner is one who may be living in a town in Israel, but does not belong to the community of Israel. He usually has neither enough property nor enjoys the support of his relatives. His unfavorable situation might make him unwelcome. Thus, he depends very heavily on the openness and hospitality of the local community. Law rules explicitly equal justice for both the Israelites and the foreigners that are living among the Israelites.[19] Thus, the law protects orphans, widows, and foreigners. However, it does not promulgate their rights but it instead commands the obligations of care, hospitality and legal protection upon those who are in power under a strict penalty:[20] "Do not mistreat or abuse foreigners who live among you. Remember you were foreigners in Egypt. Do not mistreat widows or orphans. If you do, they will beg for my help and I will come to their rescue."[21] Similarly, the law does not protect the day-workers who were considered among the most vulnerable ones by declaring their rights, but it commands an obligation of the employer to pay them the just wage at the end of each day.[22] The law does not rule about minimum rights of the poor, but it places an obligation on the farmers and landlords to take care of the poor and needy on the occasion of the harvest.[23] The law does not declare the rights of the handicapped, but it commands every Israelite, "to not to make fun of the deaf or to cause a blind person to stumble."[24] The law obliges every Israelite to consider everyone who might be in need and distress.

The law in the Hebrew Bible does not aim at otherworldly ideals, but it aims at amending and redressing injustice immediately and concretely, as well as at reforming the social conditions that allowed for or directly caused injustice. For instance, the law does not aim at feeding the hungry only but at enabling them to emancipate themselves from the conditions that lead to starving.[25] The law requires not only a fair solution to the particularly difficult case of the daughters of Zelophehad, but it also promulgates the rule for similar cases in the future.[26] The law does not aim at creating an egalitarian society but it repeatedly admonishes the strong and the well off to give consideration to the needy and marginalized ones. The tradition of solidarity has not only economic and social aspects, but also a religious dimension. To respect law and do justice is to worship JHWH.[27] To sum up, the law in the Hebrew Bible aims at living in solidarity in a community with a strong accent upon individual responsibility.

Forms of laws

The laws are expressed through various forms in the Torah. Casuistic norms are typically formulated

[18] Dt 25,5-10. Cf. Gn 38 a Rt 4,5.
[19] Lv 24,22.
[20] Cf. The Book of Covenant: Ex 22,20-23; 23,9; the Holiness Code: Lv 19,33-34; 24,22; 18,26; the Deuteronomy Code: Dt 15,7-8; 24,17-18 a 27,19. Also Proverbs 14,21.31; 21,13; 22,22-23; 23,10-11. Jb 29,12-16 a 31,16-22.
[21] Ex 22,21-22.
[22] Dt 24,14-15 a Lv 19,13. Cf. Jr 22,13; Jb 7,2; Mal 3,5.
[23] Lv 19,9-10 a Lv 23,22.
[24] Lv 19,14.
[25] Lv 19,9-10.
[26] Nu 27,6-11 a 36,1-13.
[27] Cf. Est 9,22.

from two parts: the first part describes a case that serves as a hypothesis and the second part brings the solution that rules how the case must be solved. The first part corresponds to *protasis* and the second part presents the solution that must be executed in the given case – *apodosis*. Some of the casuistic norms are made of a short story and the end of the story renders the standard solution of the story case. A typical example of a casuistic norm reads like this: "If your bull kills someone else's, yours must be sold. Then the money from your bull and the meat from the dead bull must be divided equally between you and the other owner" (Ex 21, 35). Some of the casuistic norms are made of a hypothesis that is confirmed and explained, after the resolution of the case, once again. Take, for example, "If a man is caught in town having sex with an engaged woman who is not screaming for help, they both must be put to death. The man is guilty of sex with a married woman. And the woman is guilty because she did not call for help, even though she was inside a town and people were nearby" (Dt 22, 23-24). Some of the casuistic norms reflect the hypothesis implicitly in the rationale that is based on common experience: "Don't accept bribes. Judges are blinded and justice is twisted by bribes" (Ex 23, 8). Some norms deduce a particular rationale from the concrete, historical experience: "Don't mistreat foreigners. You were foreigners in Egypt, and you know what it is like" (Ex 23, 9). Casuistic norms stem from the experience of living together and guarantee justice and predictability in the present time as well as in the future. The content of the Torah's casuistic norms resembles customary laws of neighboring peoples in a number of cases; these norms might share a common experience.[28] Common experience and predictability were crucial for the foundation of the legitimacy of the casuistic norms.

Apodictic norms are formulated as a clear-cut, categorical command or prohibition. Some of them include a sanction in the case of not respecting the command or prohibition. Apodictic norms usually rule in moral or religious cases. The apodictic rules are formulated in the singular. However, they do not establish individualistic standards of behavior, but they always address the individuals in the community. Thus, the community is not just a sum of the individuals but a whole that strives for justice and fairness in mutual relations, according to law.[29]

There are also elements of the legal precedent form in the biblical law. As an example, in the Books of Leviticus and Numeri, there are a few cases that were presented to Moses because a just solution was not evident. Moses presented the cases to JHWH and then communicated the response to the people. The response served as the solution of the particular present case, as well as a precedent for future similar cases.[30] From the legal point of view, the historical and material

[28] Ronald DE VAUX, *Ancient Israel. Its Life and Institutions.* New York, 1997, p. 146-147.
[29] A theory of the casuistic and apodictic norms in the Torah was published in 1934 by Albrecht Alt (1883-1956), *Die Ursprünge des Israelitischen Rechts*. For a summary of the contemporary theories on legal forms in the Torah see in Raymond WESTBROOK, *The Laws of Biblical Israel,* in: Frederick GREENSPAHN, ed. *The Hebrew Bible: New Insights and Scholarship*, New York, 2008, p. 99-119 and Rolf RENDTORFF, *Hebrejská bible a dějiny*, Praha: Vyšehrad, 2003, p. 126-129.
[30] Cf. e.g.. Lv 24,10-23; Nu 9,1-14; Nu 15,32-36; Nu 27,1-11, 36. 1 Samuel 30,22-25 illustrates the dynamics of precedent, too.

exactness of the case-story does not matter so very much, the case story is not intended as a historical report; what matters is procedural dynamics. These cases always include a problematic incident that is brought to the attention of the authority and the authority's resolution is accepted as a norm for the present, as well as future similar cases. Precedent dynamics in the Torah diminishes uncertainty and unpredictability and enhances stability and predictability in interpersonal relations in the community.[31]

Conclusions

The law as we read it in the Hebrew Bible was formulated organically in the course of living of the Israeli People with JHWH. It was not formulated as an abstract project apart from the community life. The law is not a theoretical and abstract system, its terminology and language result from the life of the people.

The law defines the boundaries of relations and actions but the life of the people according to law does not mean living under the slavery of law. The meaning of Torah refers not only to law but also to guide and teaching. The legal norms and prescriptions are transparently conveyed through rational formulations. They do not rely on magic or chance and haphazard.

A characteristic interpersonal culture has developed in the context of the law of the Hebrew Bible. This culture allows living mutual relations autonomously and freely; it relies on individual accountability and responsibility. Biblical legal order does not aim at building an objective order where the individuals are obliged to move exactly according to all of the prescriptions, just as the wheels move in a machine. Obeying biblical law does not lead the individual to dissolve and disappear in an impersonal cosmic harmony. The law in the Hebrew Bible rules a framework of the obligations and rights of the individuals among themselves, and to JHWH, as well as to the created world.

Author:

Doc. Jiří Kašný, J.C.D. is senior lecturer in the John H. Carey II School of Law at Anglo-American University in Prague.

[31] Raymond WESTBROOK and Bruce WELLS, *Everyday Law in Biblical Israel*, Louisville, Kentucky, 2009, p. 13-14.

AA Law Forum
Published by John H. Carey II School of Law
No. 7, Spring 2016

Book Reviews and Notices

Radka MacGregor Pelikánová. *Selected Current Aspects and Issues of European Integration.* Ostrava: KEY Publishing, s.r.o., 2014.

JUDr. Radka MacGregor Pelikánová, Ph.D., LL.M., MBA has published another excellent study on the world today and society we live in. The purpose of the study is "to recognize the massive complexity and significance of the European integration process from the point of view of the selected current issues and aspects" (p. 15). It opens with a panoramic history of the process of European integration from the era of ancient Rome and Greece through the medieval era to modern times, thus providing the study with a broad and deeply rooted context. The chapters on the EU legal system and the primary, secondary, and supplementary sources of the EU law and general doctrines and principles of EU law, plus the Treaty of Lisbon invite the reader to think through the systematic and theoretical aspects of the integration. The more practical chapters on the enforcement of EU law, on the Court of Justice of the EU, on the budget, common agricultural policy, single internal market, economic and monetary union, and the Top Level Domain of the EU offer the reader systematic information on concrete development of the integration process.

At first sight, the book might give the impression of a collection of various articles. However, the persistent reader will soon discover that the book is a true and systematic monograph. The chapters examine, step by step, various particular problems of the general issue of the study which is EU integration and, thus they make one whole. The chapters are also interconnected from within by respecting general doctrines and legal principles of the EU. Among the accepted general principles of EU law, the study names the principle of sincere cooperation, of conferral, subsidiarity, proportionality, fundamental rights, legal certainty, and equality before the law. Chapter 4 is dedicated to a close examination of the legal principles and the whole study makes use of them while examining, commenting on and proposing solutions in other chapters. Thus, the chapters are interconnected into one systematic monograph.

The author concludes that "European integration should be perceived as a complex, intangible, and ongoing phenomenon entailing an abundance of complicated processes in various fields" (p. 165). Some of these processes are clear and well organized, other issues resemble an ongoing argument and misunderstanding. Yet, the author patiently examines clear, as well as dense and puzzling issues and does not fall into a temptation for easy conclusions.

The monograph is based on a complex and detailed research and it offers to the reader an immense source of information on European integration processes. The author's objective and exact method and exciting writing challenges the reader not only to think through the argument but also to decide for themselves regarding uncovered

problems and the proposed conclusions. Reading the book truly equips the reader with knowledge and empowers them to act where “acts are needed and words are not sufficient.”

The study can serve as an excellent textbook, as well. The author examines all the problematic issues in a logical and systematic manner and even the complex arguments are coherent and perspicuous. The author displays a broad knowledge not only in law and political science but also in history and culture; thus, the argument develops as a discussion of all the relevant disciplines. The literary style of the text is dialogical not ideological and coercive. The reader is involved spontaneously into such a dialogical adventure. The author invites the reader to use all their knowledge and implement new issues, arguments and conclusions into their picture of European integration. In such a way, reading and thinking through this study is truly enriching.

Jiří Kašný

Notices

A new book forthcoming

Radka MacGregor Pelikánová. ***New trends in perceptions and use of domain names – Critical and Comparative Analysis of the Modern Domain Name Universe.***

From the Introduction:

“Our post-modern global society is an information society where mastering information systems and information technologies (“IS/IT”) is a fundamental pre-requirement for a successful, effective and efficient operation and function in both professional and private life. Our society and we, as its members, heavily depend on the utilization of IS/IT and our knowledge, skills, readiness and, even perhaps enthusiasm, in this respect can become critical instruments and aids in our current endeavor to reach, in the official EU words, smart, sustainable and inclusive growth. Today’s big challenge isn’t a lack of information, but rather it´s quantity, disorganization and reduced relevancy and the reduced quality and quantity of its processing.

It can be observed that markets are heavily reliant upon using IS/IT and that business conduct becomes more and more “electronic”. As a result, e-instruments and e-venues are indispensable for the right and rightly done management of private, as well as professional, affairs. Thusly, e-presentation, e-marketing and e-shopping have become critically important hallmarks of current businesses. An effective and efficient business operation entails e-commerce and other e-forms, and thus e-domiciliation within the Internet, especially the www universe, is critical to success.

Recently, for private individuals as well as businesses and other entities, it appears that the establishment of both tangible and intangible forms and venues is critical and should be done in a coordinated and complementary manner. Naturally, the tangible form has its advantages and

disadvantages and performs certain functions, while the intangible form has other advantages and disadvantages and does not necessarily perform the same functions. Each has its importance and value, which is not easily assessed. Therefore, a critical and comparative analysis of a certain subtype of virtual presence, namely domains, and more specifically their domain names, seems to be highly instructive. Logically, such a study should definitely include the most famous and successful TLD(s) as well TLD(s) recently "in trouble" against all expectations.

Since the ultimate goal of this monograph is to go over a set of assumptions, hypothesis, and even clichés, and to demonstrate that what is going on right now with domain names in our practical life, both the www with domains with conventional Website as well as www with domains creating the social media sphere, need to be covered. The destiny of the www with domains, and generally of the Internet, is not easily predictable and perhaps the golden era is already behind … or maybe way ahead."